

# MODERN CORPORATION

Its Mechanism, Methods, Formation  
and Management

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## PREFACE.

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In this fourth edition of "The Modern Corporation" the author has made the various changes necessary to bring the volume up-to-date, has made such minor emendations in the text as seemed desirable, and has added to the number of its forms. The most important change is, however, in the arrangement of the volume; the consideration of the mechanism and management of corporations now preceding the discussion of their organization instead of following it as before. The former arrangement was logical but, from the practical standpoint, one unfamiliar with corporate matters requires a knowledge of corporate mechanism and procedure and of the ends to be attained by incorporation before this latter subject can be intelligently considered, and for this reason the change referred to has been made.

Speaking generally, however, "the endeavor has been to follow out and extend the design of the original work,—to give a general view of the corporate system, to summarize the objects, methods and advantages of the corporate form, to show the ready adaptation of the modern corporation to the needs of ordinary business, to outline the manner of its formation and to give the important rules of its procedure,—in short to present from a practical stand-

point, the facts, directions and general information concerning corporations that every man of affairs should know and that those responsible for or interested in corporations must know if they would properly perform their duties or protect their interests."

The forms added to the present edition are those practical forms which are needed in the management of a corporation and are also desirable in any general consideration of corporate organization and procedure. They were excluded from former editions by the limits of space.

In closing, the author wishes to express his appreciation of the very kindly reception accorded the present work, and to trust that the new edition may even better fill the ends for which the volume is designed.

THOMAS CONYNGTON.

NEW YORK, SEPTEMBER 1, 1909.

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## THE MODERN CORPORATION.

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### PART I.—THE CORPORATE SYSTEM.

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#### CHAPTER I.

#### THE CORPORATION.

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##### § 1. Nature.

A corporation is an artificial person, created or authorized by the law for some particular purpose or purposes. It has, therefore, only those rights and powers which are given it by the law. These rights and powers vary in the different states but are in all cases sufficient for the demands of ordinary business.

A corporation is usually composed of a number of persons associated together, though it may, and sometimes does, consist of but one or two members. These members, or stockholders, are not, however, the corporation. They compose it but the corporation has a name, an entity and an existence of its own, entirely apart and distinct from that of these members. Under its corporate name it may conduct business, make contracts and bring suit. So absolutely different is the corporation's existence from that of its stockholders

that it may enter into contracts with these latter, may sue them or be sued by them. (See § 13.)

In the famous case of the Trustees of Dartmouth College *vs.* Woodward, Chief Justice Marshall defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of the law." In other words the corporation exists, and, through officers and agents, may carry on its business, but there is no individual or group of individuals who can legitimately claim to be the corporation. They may own or control or represent the corporation, but they can not be the corporation.

## § 2. Classification.

Corporations are used for such a wide diversity of objects that any classification based on the purposes for which they are formed overlaps and is apt to be confusing. The government of a city or the management of a college, the activities of a church or the operations of an industrial combination, the administration of an estate or the control of a railway system, may all be efficiently conducted under the corporate form. We speak generally of manufacturing, municipal, religious, educational and banking corporations and the like, thus roughly grouping them according to their purposes, but the classification is not entirely satisfactory.

A logical classification is that which separates all corporations into (1) public and (2) private corporations. Public corporations are those formed by the community for its own governmental purposes, as in

cities, villages and towns. These are called municipal corporations. In the Dartmouth College case, already quoted, it was said that "strictly speaking, public corporations are such only as are founded by the government for public purposes where the whole interests belong also to the government." All other corporations are private corporations.

Corporations formed to conduct public utilities, such as railroads, turnpikes and telegraph systems, or to supply water, gas and electricity, are frequently termed quasi-public corporations, but, if they are conducted for private gain, they are properly classed as private corporations, even though the State may own part of their stock.

Private corporations may be divided into corporations without capital stock and corporations with capital stock.

### § 3. (a) Corporations without Capital Stock.

Most religious, educational, charitable and social organizations belong to this class. They are non-stock, or membership corporations. In some cases certificates of membership are issued to the members, but these are not stock certificates and are not usually transferable. When corporate action is taken each member has one vote without regard to the amount of his financial interests, if any, in the corporation. Mutual insurance companies are non-stock corporations, as are also stock exchanges and other similar organizations. Curious questions sometimes arise as to the rights and interests of the members of such

corporations, but the subject is not of sufficient general interest to justify its discussion here. The body of modern corporation law has to do with the stock corporation.

#### § 4. (b) Corporations with Capital Stock.

Stock corporations have a capital stock divided into shares, usually of like amount, which are evidenced by transferable certificates of stock. These stock certificates are issued to the members of the corporation, who are termed stockholders, the certificates evidencing the number of shares to which their owners are entitled.

The ultimate control of the corporation rests with the stockholders, who act in meetings and by vote. Each share of stock usually entitles its owner to one vote in stockholders' meetings, hence those owning a majority of the shares control the corporation. When profits are to be divided, they are distributed among the stockholders in proportion to the number of shares owned by each.

On account of the convenience of the system, all corporations intended for profit are organized as stock corporations.

Stock corporations may be conveniently divided into the following classes:

- (1) Corporations for general business purposes.
- (2) Corporations for public service.
- (3) Corporations for financial purposes.



### § 5. (1) Corporations for General Business Purposes.

This class includes the greater number of existing corporations. In most states of the Union general laws have been passed providing that upon compliance with simple prescribed formalities and payment of certain moderate fees companies of this class may be incorporated. In a few states corporations may also be authorized by special act of the legislature, but the practice prevailing in most of the states permits incorporation only under the provisions of general laws, the benefits of which may be enjoyed by all alike. Many of the states have constitutional prohibitions against special incorporations. (See § 10.)

The law and procedure relating to corporations for general business purposes, such as manufacturing, mining and industrial corporations, make up the great body of modern corporation law. The present work treats primarily of this class of corporations.

### § 6. (2) Corporations for Public Service.

The corporations which control railways, telegraph and telephone lines and which furnish transportation, light, water and power in our great cities, form another exceedingly important class. These corporations are allowed, under certain restrictions, to exercise the right of eminent domain, and in some cases are given special and exclusive privileges in the public ways.

The peculiar nature of the privileges conferred upon this class of corporations, and the not infrequent re-

sulting abuse of their monopolistic powers, render them the subject of constant and increasing legislative restriction and regulation. The laws enacted for this purpose apply solely to this class of corporations and are mostly outside the scope of the present volume. It is to be noted, however, that these corporations are subject to the general corporate law and procedure applicable to all stock corporations, as well as to those special regulations applicable only to public service corporations.

### § 7. (3) Corporations for Financial Purposes.

Under this head are included all banks, trust companies, insurance companies, guaranty companies, building associations and other similar institutions handling the funds, savings or investments of the public. The laws under which these may be organized usually require evidence of substantial financial responsibility and of actually paid in cash capital. After organization certain detailed reports are required and the corporation is usually subject to some form of governmental supervision. In each state corporations of this class are subject to special statutory regulation, except national banks, which are created and supervised only by the National Government.

In the details of their management, not regulated by special statutes, these financial corporations are subject to the general statutory and common law rules and procedure by which all stock corporations are governed.

### § 8. Joint-Stock Companies.

In most of the states a joint-stock company is practically a partnership, authorized by law to act under a corporate name and to issue stock to its members. Thus, as existing under the laws of New York, the joint-stock company has been defined by the State Court of Appeals as "a partnership with some of the powers of a corporation." In some few states, however, partnership associations are permitted in the nature of joint-stock companies, but of such indefinite character that their proper classification has puzzled the courts. In some few other states the term "joint-stock company" is loosely and inaccurately applied to the ordinary stock corporation.

Joint-stock companies are sharply distinguished from the corporation by their method of formation and by the liabilities to which their members are subject. Their stock, it is true, is transferable and represents the interests of the members in the profits and property of the business just as in the case of the ordinary corporation, but here the resemblance ceases. Their members are individually liable for the debts of the company exactly as in the partnership, and, whereas a corporation may only be formed by compliance with prescribed statutory requirements, or by special legislative enactment, joint-stock companies are, like partnerships, formed by mere agreement of the members among themselves.

A joint-stock company lacks the most attractive features of the corporation, is of but little real utility, and has never attained any great degree of popularity.

## CHAPTER II.

### STOCK CORPORATIONS.

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#### § 9. Distinctive Features.

The distinctive features of a modern stock corporation may be summarized as follows:—

- (a) Its creation and regulation by the state.
- (b) The limitation of the corporate powers to the objects specified at the time of its creation.
- (c) The limitation of the liabilities of the stockholders.
- (d) The distinct entity of the corporation for all legal and business purposes.
- (e) The permanence of its organization.
- (f) The representation of the interests of the stockholders in the corporation by transferable shares of stock.
- (g) The corporate mechanism of directors, officers and agents, working under definite rules of action.

These are the most important and characteristic features of corporate existence. They are possessed by every stock corporation, and every organization possessing them is a stock corporation. They em-

body the peculiar advantages of the corporation over the partnership. They are discussed in the present chapter in the order given.

#### § 10. (a) Creation by the State.

A partnership may be formed by the mere agreement of the parties. A corporation, on the contrary, may be created only by the State. Formerly each corporation was created by a separate legislative enactment. This made the grant of corporate powers a legislative favor to the recipients and resulted in much abuse and corruption. To avoid this the various states of the Union have passed general laws governing the formation of corporations. These laws vary in the different states in minor details. All are alike in their general plan and scope. Under them qualified persons making due application and paying certain established fees to the state, are granted a charter authorizing them to organize a corporation for the specified purposes, if legitimate, in accordance with the terms of their application. (See Ch. XII.)

#### § 11. (b) Limited Powers.

An individual or a partnership may engage in any business that seems best, and may change from one business to another at pleasure. A corporation, on the contrary, is limited to those purposes enumerated in its charter, and has no authority to engage in any other business or venture unless authorized thereto by amendment of its charter.

Formerly in most states a corporation could be organized for only one purpose or line of business. Of late years the corporation laws of many states have been so changed that more than one purpose may be enumerated, and it is possible to give a modern corporation very broad powers. In the case of the great industrial combinations this enumeration of diverse purposes has been carried to such an extreme that almost every restraint has been removed, and it would be difficult to find any industry or business that can not be undertaken. (See § 19.)

Directors of corporations have no power to undertake in the corporate name enterprises which are not permitted by the charter. Such matters are in legal parlance termed "things *ultra vires*." (See § 28.)

### § 12. (c) Limited Liability.

Subscribers to the stock of a corporation are liable to the corporation for their subscriptions. If these have not been paid, the corporation, or its creditors in case of its insolvency, can compel payment just as payment of any other amounts due the company can be compelled. Also if subscriptions are accepted by the corporation at less than par, corporate creditors can usually force payment of such additional amount as will render the stock full-paid. Beyond this liability, known as the subscription liability, there is in most states no individual liability whatsoever on the part of the stockholders for any indebtedness of the corporation. (See §§ 37, 50.)

This freedom from liability is the great inducement to corporate investment and the use of the corporate form generally. It is the exact opposite of the rule that obtains in the partnership, where, if credit is given, it is extended on the individual responsibility of the partners and each is held legally answerable for all the partnership debts. In the corporation, on the other hand, if credit is given, it is extended on the reputation and solvency of the corporation alone, and, provided all stock is paid in full, the corporation alone can be held.

In some few states this general rule has been varied, special liabilities having been created by statute. These liabilities are, however, exceptional and not characteristic of the corporation. In the great majority of the states the stockholder when once his stock has been paid for in full, is liable neither to assessment by the corporation nor to action by its creditors. If his corporation becomes insolvent he may lose his investment, but he need fear no further involvement.

### § 13. (d) Legal Entity of Corporation.

The distinct legal entity of the corporation may best be shown by a comparison of the relations of stockholders to their corporation and of members of a firm to their partnership. The difference is radical.

A partnership is an association of which each partner is an integral and inseparable part. Hence each partner represents the partnership fully, can make contracts for it without consultation with other part-

ners and can bind it by his action. On the other hand he can not contract with his partnership, bring suit against it, or be sued by it, any more than he could so act with or against himself.

A corporation on the contrary is itself a legal entity, distinct from its stockholders. These stockholders as individuals do not represent it, can not make contracts for it, nor bind it in any way. Each may, however, deal with the corporation as with a stranger, may contract with it, may sue it, may be sued by it.

A partnership, even though it may have a trade name can not sue or be sued under this name, but in every action at law the name of every partner must appear.

The corporation, on the contrary, may bring suit in its own name and may be sued in like manner, without the necessity of naming its stockholders or any of them.

The partnership, in short, is merely an association of the people who compose it, while the formation of a corporation creates, for all legal purposes, a new personality, having a legal existence and rights of its own distinct from those of its members and stockholders. It is true that this doctrine of the distinct legal entity of a corporation is a legal fiction, but for all practical business purposes it is an actual fact upon which is based almost all existing corporate law and procedure.

The courts recognize this doctrine fully, and, except in certain cases of fraud, treat the corporation as a complete and competent legal personality.



## § 14. (e) Permanence.

A partnership may be dissolved at any time, at the will of any partner, and is necessarily dissolved if a partner dies, becomes insolvent or sells out to a stranger. A corporation, on the contrary, continues for the term of its existence, uninterrupted by the dissatisfaction, financial embarrassment, death or retirement of its stockholders. Its entire membership may change again and again, but the corporation continues. The old writers were fond of comparing it to a river, which remains always the same though the water that composes it is constantly changing.

In some states corporations are only chartered for a limited period such as twenty or fifty years. Unless the charter or statutes limit the term of existence, or unless the constitution or statute law of the state expressly reserves the right to repeal or amend charters, the duration of a corporation is technically at least perpetual. Many modern charters state boldly that the duration of the corporation shall be perpetual.

The duration of a corporation is usually terminated (1) by voluntary dissolution, (2) by the expiration of the period for which it was formed, (3) by its insolvency or (4) by forfeiture of its charter to the State for misuse, non-use or abuse of its power. These are the only legal methods by which a corporation may be terminated. (See §§ 25, 107.)

In most of the states, the right to repeal or amend corporate charters is reserved by the state. This power, however, may not be exercised arbitrarily or unreasonably.

### § 15. (f) Stock System.

The division of the stock of the corporation into shares represented by stock certificates, transferable by indorsement, is one of the most convenient features of the modern corporate system. It permits the investment of varying amounts, and gives each investor due proportionate interest both in the management and in the resulting profits of the business. It provides a ready method for withdrawal of his investment by the sale of part or all of the stockholder's interest to some other investor. In case of the death of a stockholder it renders the transfer or division of his interest a simple matter. It is in striking contrast to the complexity, cumbersomeness and difficulty of transferring an interest in an ordinary partnership. (See Ch. v, VI.)

### § 16. (g) Corporate Mechanism.

A corporation is created by the grant of a charter from the State. This instrument in general terms defines the rights and powers of the corporation. After this charter has been allowed the incorporators hold a meeting, and adopt by-laws, which are the general rules for the government of the corporation and which lay down the lines along which the business of the corporation is to be conducted. The stockholders also elect a board of directors, which, under the limitations and regulations of the charter and by-laws, controls and manages the business and property of the corporation.

The directors at their first meeting, elect officers

and take such other action as may be necessary to inaugurate the corporate activities. Thereafter they hold their meetings from time to time as may be required by the by-laws or the necessities of the business. In addition to the elected officers, they may appoint such other agents as may be necessary. These officers and agents are subordinate to the board and must obey its instructions.

The respective powers, duties and relations of the stockholders, the directors and the officers, are all well understood and clearly defined. (See §§ 49, 61; also Ch. VIII.)

#### § 17. (h) Attractiveness to Investors.

As a consequence of the advantages enumerated, and because of the liabilities and inconveniences of the partnership, the corporate form is peculiarly attractive to the investing public. Created by the State for a fixed period, it is not liable to sudden or unexpected termination. It moves in well defined grooves and the rights and liabilities of all concerned are defined by law and well settled by custom. It permits investment to a definite extent without indefinite or continuing liability and without the necessity of the investor becoming identified with the management. Also an interest may be secured and then sold, transferred or transmitted to posterity with a minimum of formality and at nominal expense.

For these reasons, whenever outside capital is to be secured for an enterprise, or capital already engaged is to be increased, recourse is naturally had to the corporate form.

## PART II.—CORPORATE MECHANISM AND MANAGEMENT.

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### CHAPTER III.

#### THE CHARTER.

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##### § 18. Definition—Synonyms.

The terms, certificate of incorporation, articles of association, etc., are synonymous with the older and briefer word, charter. A charter is the formal authority from the State for the existence of a corporation,—the legislative fiat by which it is created. It is to the corporation what a constitution is to a civil government. It is the foundation upon which the corporate structure is built. (See Forms 8, 9, 10.)

Charters for ordinary business corporations are not granted by the national government, the matter being left entirely with the states. The general government does, however, grant charters for national banks, has chartered sundry railway companies to build interstate lines and it is probable that it could constitutionally incorporate companies for other purposes,—that is for the purposes of ordinary business. Important ad-

vantages would result from a national incorporation law accompanied by some measure of governmental supervision. As it is, the corporation laws of the various states differ greatly as to detail and this lack of uniformity occasions much inconvenience.

The charter creates the corporation and authorizes certain specified individuals to organize it and conduct its operations. Such charter may include the grant of a franchise, as, for instance, for the construction of a bridge, a railway or other work, or may merely give the right to conduct some ordinary specified business.

As has been stated, charters were formerly granted only by special legislative enactment. Now they may be secured under general laws and in many states may be secured in no other way. (See § 100.) Under these general laws incorporation has become a comparatively simple matter, the number of incorporations has enormously increased and the corporate form is now employed for almost every variety of human effort and enterprise.

#### § 19. Charter Powers—General.

The grant of a charter bestows upon a corporation all the powers properly specified in the charter application. In addition to these specified powers—which are usually those necessary to conduct the business or enterprise to be undertaken by the corporation—the charter confers certain general powers whether specified or otherwise. These general powers are as follows:

- (a) To sue and be sued.
- (b) To use a seal.
- (c) To buy, sell and hold property.
- (d) To appoint directors, officers and agents.
- (e) To make by-laws.
- (f) To dissolve itself.
- (g) To do all things necessary.

These are discussed in order in the following sections:

§ 20. (a) To Sue and be Sued.

A partnership may be sued only by joining all the partners. That is, each partner must be named separately and be made a party to the action. A corporation may sue or be sued under its corporate name just as may an individual. No mention need be made of its stockholders. A summons may be served on any managing officer, on any director or on an agent in charge of the corporate affairs.

§ 21. (b) To Use a Seal.

This was once a highly valued privilege, but its original significance has largely disappeared. Formerly the seal was the essential feature of the corporate signature. Now the corporate signature may be affixed by any properly authorized agent without the use of the seal, save in those few cases where an individual must use a seal, as in the conveyance of real estate or the execution of a bond.

The seal of a corporation is still, however, an important adjunct. It is used, without regard to its

legal necessity, in the execution of all formal instruments and is impressed on every certificate of stock. It is also used in the certification of resolutions, by-laws, etc. The custody of the seal usually rests with the secretary of the corporation. (See § 97 and Form 48.)

**§ 22. (c) To Buy, Sell and Hold Property.**

The general statement of this power must be taken with some qualifications. The property must be such as pertains to the business of the corporation and such as it is permitted to hold under the laws. In some states the ownership of land by corporations is restricted. Also in many states a corporation may not hold shares of stock in another corporation. This was formerly the general rule but in recent years it has been modified in some states, as in New York where such power is granted if set forth in the charter, and in others has been abrogated altogether, as in New Jersey where a corporation may hold stocks as freely as an individual.

**§ 23. (d) To Appoint Directors, Officers and Agents.**

This power is absolutely necessary as the corporation can act only through such representatives. The stockholders at their annual meeting elect directors who have charge of and manage the corporate affairs. These directors then meet and elect a president, a treasurer, a secretary and such other officers as may be desired. Agents may be appointed by the directors or by the officers, when authorized thereto.

#### § 24. (e) To Make By-Laws.

The by-laws are adopted by the stockholders. They are the working rules of the corporation and provide for the details of its operation. The by-laws are subordinate to the laws of the land and to the charter of the corporation, and their provisions must not be inconsistent with these higher authorities. Under this limitation, however, the by-laws have wide scope.

As the stockholders make the by-laws, they can through these by-laws exercise a general control over the corporation and its affairs and this is the only way in which they can make their wishes effective. The by-laws therefore occupy a very important position in matters corporate. (See Ch. iv; also §§ 49, 72 and Form 13.)

#### § 25. (f) To Dissolve Itself.

When a corporation has failed in its object, or has become unprofitable, or has completed its intended course, or has disposed of its business and property, its dissolution may become desirable. Formerly this was a proceeding of some difficulty as the unanimous consent of all the stockholders was generally required. Now, however, in most states special laws have been enacted whereby some specified majority of the stockholders by simple statutory proceedings may dissolve the corporation. In such case the assets are sold, and, after payment of any corporate debts, any remaining funds are divided pro rata among the stockholders.

It sometimes occurs, and more particularly among



corporations formed for speculative purposes, that a corporation fails and has absolutely nothing left of material value. Under these circumstances the trouble and expense of a formal dissolution are at times avoided by the very simple expedient of abandoning the corporation. This, while not recognized by the law, works a virtual dissolution. (§§ 14, 107.)

**§ 26. (g) To Do All Things Necessary.**

A corporation organized for some specified purpose has the legal right to do all proper things necessary to carry out that purpose, as, for instance, a corporation organized to build and operate a factory would without special authorization thereto have the right to buy and hold the real estate required for the erection of its plant.

In modern charters it is customary to specify many purposes and to amplify each to the utmost extent. Most of the powers usually specified would be included and secured without mention, as being incident to the main purpose or purposes.

**§ 27. Charter Powers—Special.**

The special powers of a corporation are those specifically mentioned in its charter which, if not so mentioned, it would not possess. The usual purposes with their customary extensive amplifications are included among these, but in most states the law allows many further powers that add much to the value of the corporate system.

Among these may be mentioned the varied provisions as to the issue of preferred and other special stocks, the system of cumulative voting, the power to hold stock of other corporations and the like. Also restrictions of various kinds may be embodied in the charter, such as limitations on salaries to be paid officers, or restrictions on the power to mortgage the corporate property or to contract indebtedness generally. (See §§ 111, 115, 139-141.)

As a rule special powers may only be secured when expressly allowed by the statute law, and in the different states the laws vary widely in respect to the special powers permitted. In some states certain powers which are usually special privileges have been conferred by statute, so that all corporations enjoy them whether mentioned in the charter or otherwise. For instance, in New Jersey any corporation may acquire the stock of other corporations, and in Pennsylvania, Illinois, California and some other states cumulative voting at all corporate elections is prescribed by constitutional provision.

### § 28. Things Ultra Vires.

An individual or firm may do anything not forbidden by the law. A corporation, as a creature of the law, may only do those things expressly permitted to it under the law. All other things are beyond its powers, or in legal parlance, *ultra vires*. Contracts involving matters *ultra vires* can not be enforced by the corporation, though if the other parties to such a con-

tract have performed their part, the contract may be enforced against the corporation—that is this latter can not evade its obligations by the plea of *ultra vires*. Directors and officers may make themselves personally liable for involving the corporation in transactions of this nature.

It must be said, however, that such exceedingly broad powers are now allowable under the laws and are so generally claimed by modern charters that the doctrine of *ultra vires* has not the importance it once had. Also, in a private business corporation without creditors almost any legitimate business transaction, whether authorized by the letter of the charter or not, may be undertaken without risk of interference from the law, if it has the assent of every stockholder.

#### § 29. Amendment of Charter.

Any corporate right or privilege that might have been secured by inclusion in the original charter of a corporation may, in most of the states, be secured by charter amendment, and such amendment may be made at any time, even before the organization of the corporation is completed.

Charter amendments are either the result of a too hasty preparation of the charter, or otherwise of changed conditions. At all times they involve both trouble and expense. When desired, they must in like manner with the original charter be secured either by means of a legislative act or by following the course prescribed by general laws.

As soon as a charter amendment has been allowed by the state authorities, its provisions become to all legal intents, part of the original charter, and as permanently binding on the corporation. The charter amendment and the original charter then together constitute the working charter of the corporation, the amendment taking precedence of and modifying the original charter in all points of difference.

The procedure for the amendment of the charter is prescribed by the statute law and varies in almost every state. In some few states the procedure varies with the nature of the amendment, as in New York, where application must be made to designated courts if the name of the corporation is to be changed, while to change the number of directors, application must be made to the state authorities.

As a preliminary step, amendments of the charter usually require the due and formal assent of at least two-thirds of the outstanding stock of the corporation. The amendment so authorized is then as a rule filed in the same offices and with the same formalities as the original charter, becoming effective as soon as allowed and filed.

## CHAPTER IV.

### BY-LAWS.

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#### § 30. Definition.

By-laws are the more permanent rules of corporate action as distinguished from motions and resolutions, these latter usually applying only to particular occasions and special matters.

A corporation is controlled (1) by the corporation laws of the state in which it is domiciled, (2) by the provisions of its charter and (3) by its by-laws, these three ranking in the order given as to authority. Hence all by-laws must be in harmony with the statutes of the state and also with the provisions of the charter of the particular corporation. Any by-law that does not accord with these higher authorities is void and of no effect.

By-laws are enacted by the stockholders and by them alone, unless, by statute, by charter provision or by action of the stockholders themselves, such power has been delegated in greater or less degree to the directors of the corporation. (See §§ 31, 72, 94; also Form 13.)

### § 31. Adoption.

There is usually no law, save the law of necessity, compelling a new corporation to adopt by-laws. Its operation without by-laws would, however, be practically impossible—so much so that the law confers the power to adopt by-laws and takes it for granted that this right will be exercised by the corporation.

It is true that when the incorporators meet for the organization of a corporation they already have the provisions of the state statutes and of their charter for the corporate guidance. These control as far as they apply, but, alone, they are incomplete and utterly inadequate and the by-laws must be added to provide for the many details of organization, administration and business routine yet to be covered.

The by-laws also usually include a systematic statement of the more important provisions of the charter and of the state law applicable to corporations. This is done in order to provide a convenient and accessible memorandum of these provisions. Without this they might be overlooked or forgotten.

A reasonably complete set of by-laws is usually adopted by the stockholders at their first meeting, and these by-laws are added to, amended or repealed from time to time thereafter as may be necessary.

In those states where power to make by-laws may be delegated to the directors, the privilege is very generally exercised. Such delegation of power ranges from the mere right to make by-laws in conformity with those adopted by the stockholders up to the wide

and unrestricted power to make and alter by-laws at will. This latter power may be conferred by proper charter provision in New Jersey and some other states and is not unusual among the larger industrial combinations.

Save when the directors are empowered thereto, the by-laws may only be added to or otherwise modified by formal action of the stockholders in duly assembled meeting. In the larger corporations with their numerous and widely scattered stockholders, such meetings are necessarily a matter of time and difficulty, and it is desirable that wide power over the by-laws be given the directors to permit proper freedom of action under unforeseen circumstances. In the smaller corporations, however, such power should be granted with caution, if at all, as it practically results in divesting the stockholders of all power of control, removing the usual restrictions upon the actions of the directors, leaving the property and affairs of the corporation unreservedly in the hands of these latter and radically altering the whole corporate scheme. (See § 72.)

By-laws should be carefully drawn, properly adopted and accurately recorded in the minute book of the corporation. (See § 122; also Form 14.) They should fully provide for all the important details of corporate procedure, such as the issuance and transfer of stock, the meetings of stockholders and directors, the election of directors and officers, the respective duties and responsibilities devolving upon these, and

the care and management of the corporate property and finance. They should also include the more important provisions of the charter and of the statute law as far as applicable.

The by-laws of the corporation should be adapted to its particular needs. It is obvious that a small corporation with most of its stockholders at hand and with its officers and directors engaged personally in its business, does not require the comprehensive by-laws desirable for the great industrial corporations with thousands of stockholders widely scattered over the country and operating plants in half a dozen different states. It may be said generally that the by-laws should be clear, simple and direct and sufficiently complete to efficiently serve the purpose of the particular corporation. (See § 122; also Form 13.)

### § 32. Amendment.

The by-laws usually prescribe the method of their repeal or amendment. Unless otherwise provided by statute, charter or by proper provision of the by-laws themselves, these by-laws may always be repealed or amended, either in whole or in part, by a majority vote of a quorum of stockholders at any regular meeting, or at any special meeting duly called for that purpose. The directors have no power to repeal or amend by-laws under any circumstances unless such power is expressly given them by the laws of the state of incorporation, by the charter of the corporation or by its by-laws.



It should be noted that by-law provisions requiring unusual formalities or specified majorities for the repeal or amendment of the by-laws are, in themselves, of but little effect. A majority at any regular meeting of the stockholders, or at any special meeting properly called for the purpose, may repeal any such provision, if unsupported, and then proceed with desired amendments or modifications of the by-laws at will. To be effective such provisions must be legally sustained in some way, as by inclusion in the charter. Sometimes the doctrine of vested rights comes to their support, as where a valid contract would be impaired by amendment or repeal of by-laws by less than the specified majority.

By-laws if carefully drawn in the first place, with due regard to the needs and conditions of the corporation and its business, will seldom require material alteration. Changes that are found necessary will usually be limited to such additions and amendments as are required by new or changing conditions.

### § 33. Enforcement.

Every stockholder, and, in many cases, every creditor of a corporation may demand as a right that its business and procedure be conducted in strict accordance with the provisions of the statutes, of its charter and of its by-laws.

Infractions of the laws or of the charter requirements are comparatively infrequent and are safely left to be dealt with by the law of the land. Infractions

of the by-laws, and disregard of their provisions are much more frequent and are more properly within the scope of corporate regulations.

Direct penalties for the violation or non-observance of by-laws are sometimes provided. These usually take the form of fines, but such penalties are, as a rule, unsatisfactory and very difficult of enforcement. In practice the smaller infractions and omissions on the part of directors and officers are usually passed over, or their too frequent recurrence prevented by the substitution of more reliable officials at the next election. The more serious violations bring their own penalties in the legal liabilities and entanglements that necessarily follow. For instance, a special meeting called without proper formalities is illegal and its action void. Contracts entered into without proper authorization may be summarily set aside. Corporate action taken in disregard of by-law provisions is for that reason not only illegal but may at times involve the directors and officers concerned in personal liabilities.

In this general connection it is to be noted that a corporation has no power to expel a stockholder, nor to deprive him of his rights of membership no matter what his offence. Any such penalties, if imposed, can not be enforced.

## CHAPTER V.

### STOCK.

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#### § 34. Capital Stock.

The capitalization or capital stock of a corporation is the nominal capital authorized by its charter, *i. e.*, the amount of stock as fixed by its charter which the corporation is empowered to issue. As shown later this may be the same or may be entirely different from its actual cash or property capital.

For the sake of accuracy and convenience in expressing the interests of the stockholders in the capital stock, and in the corporate property and business which this capital stock represents, it is regarded as divided into equal shares, termed "shares of stock." When by purchase or otherwise a person acquires an interest in the capital stock, he becomes a stockholder in the corporation, and his interest is expressed in these shares of stock.

Certificates of stock are issued to stockholders evidencing the number of shares which they own. These certificates of stock are popularly, though incorrectly, referred to as "stock." The interest they represent

in the corporation is also, and correctly, designated "stock." (See § 42.)

The par, or face value of shares of stock is fixed by the charter of the particular corporation, and, unless expressly limited by statute, is placed at any amount desired by the incorporators. One hundred dollars is the most common par value of shares. In mining companies one dollar is a common par value, adopted with a view to impressive offerings and the reception of smaller subscriptions than could be taken with larger shares. In close corporations, or where a general sale is not desired, the face value of the share will sometimes be fixed at \$500 or even \$1000. Shares are not ordinarily issued in fractional parts, but only in amounts of one or more whole shares. (See § 105.)

As the holdings of the stockholders of a corporation are expressed in shares, it follows that the number of shares owned by any individual gives an accurate measure of his interest in the corporation. For instance, if a man owns ten shares of the par value of \$100 each in a corporation with a capitalization of \$10,000, all of which is issued, he owns a total stock interest of \$1,000, or one-tenth of the entire outstanding capital stock, and therefore has an undivided one-tenth interest in the entire corporate property and business.

The interest of a stockholder in his corporation is always an undivided interest, *i. e.*, no particular part of the property, or the business, or the capital stock

belongs to the particular stockholder, but he owns his proportion of all these. If the corporation, from insolvency or other reason, were liquidated, any property remaining to the stockholders, or its proceeds, would be divided among them in the proportion of their stock holdings. In that event the undivided condition of their interest would terminate, but so would the corporation. As long as any corporate property exists their interests are in the undivided common property.

It may be noted that the par value and the actual value of a share of stock may be very different. A hundred dollar share of stock in a prosperous corporation will frequently be worth several times that amount, while in an unsuccessful corporation it may be worth little or nothing. In either case the par value remains the same. (See § 35.)

Stock certificates are issued as a convenient evidence of the stockholders' interests in a corporation, and every stockholder whose stock is paid for has a right to such a certificate. These certificates state the number of shares owned, their par value, and usually any other material facts affecting the stock in question, as, for instance, if such be the fact, that it is full-paid, or that it is preferred stock. These certificates of stock are signed by the president and secretary, or president and treasurer of the corporation and are sealed with the corporate seal. When properly issued, they are conclusive evidence of the ownership of the stock represented by them.

The stock certificate, as already stated, is merely the evidence of ownership of stock and is not the stock itself. The stock of a corporation usually exists, and may be bought and sold by proper entries on the corporate books, before stock certificates are issued at all. (See §§ 42, 90, 91; also Forms 60-62.)

Each share of stock usually entitles the owner of record (See § 42) to one vote in all proceedings of the stockholders, whether assembled in annual or special meeting. In most states by proper charter provision the voting power of stock may be restricted, or stock may be issued without the voting power. Preferred stock is very frequently so issued. Unless expressly denied or restricted by proper provision, all stock has the usual voting power and this right may be exercised by the owner of record in person, or, usually, by proxy. (See §§ 42, 56.)

### § 35. Capital Stock vs. Capital.

The "capital stock" or capitalization of a corporation should be very clearly distinguished from its "capital."

The capital stock is the total amount of stock the corporation is authorized by its charter to issue. This amount is fixed in the first place by the parties organizing the corporation—who are termed the incorporators—and, once accepted and authorized by the State, may only be changed by formal amendment of the charter.

The capital, on the other hand, is the actual amount

of property owned by the corporation,—that is, its assets. It is obvious that the value of these assets is liable to change with the fluctuations of the business or from other causes. The capital stock of the corporation and its capital, therefore, even though equal at first, may and frequently do differ greatly in amount. For instance, the capital stock of the Chemical Bank of New York City is \$3,000,000 while its capital is over \$7,500,000.

In conservative incorporations the capitalization usually corresponds with the initial capital. That is, for every dollar of stock the corporation issues at the time of its formation, it receives a dollar in cash or property. Later this relation will vary, the capital stock remaining the same but the capital increasing or diminishing with the fluctuations of the business.

In corporations of a speculative nature, as well as in some others, the capital stock is usually and intentionally fixed at an excessive figure. This is done in order that the stock may be sold at prices far below its apparent value, or in the expectation that the future earnings will support and justify the capitalization. In some cases capitalizations are increased far beyond the value of the corporate property for the purpose of concealing the profits actually earned by the particular corporation. Companies with these excessive capitalizations are said to be over-capitalized, and when this over-capitalization is intentional, the stock is said to be watered. (See §37.)

Each share of stock issued by a corporation repre-

sents both the undivided ownership of its proportion of the assets and the right to its proportion of all dividends declared. The selling price of stock therefore is largely governed by these two factors, fluctuating according to the amount of capital and the rate of dividend. Thus when the capital stock of the Chemical Bank was \$300,000, its assets over \$7,500,000, and its annual dividends 150 per cent., its shares of the nominal or face value of \$100 sold at over \$4,000. Now with capital stock increased to \$3,000,000, its assets practically unchanged and the aggregate amount of its dividends the same—15 per cent. annually on the increased capitalization—its stock sells at approximately \$425 for each \$100 share.

### § 36. Unissued and Issued Stock.

Unissued stock is in itself a nullity. Until it is issued it represents nothing. It is not an asset of the company but is merely an unexercised right to issue stock when and as subscriptions for it can be obtained.

Unissued stock usually represents excess capitalization. For instance a corporation organized to take over property worth \$20,000 might perhaps be capitalized at \$25,000 with the idea of selling the excess stock to raise working capital. Or perhaps a corporation will be capitalized with a view to its future needs at \$100,000, when but \$50,000 will meet all immediate requirements. This \$50,000 alone is then issued. The difference of \$50,000 is unissued stock entirely without value except for the power it gives



of issuing this additional stock at any time it may be necessary without the formalities that would otherwise be required.

Issued and outstanding stock is that stock which has been issued for cash, property, labor, services or other values, or which has been subscribed for and the subscriptions accepted by the company. The actual certificates by which this stock is represented may not have been issued, but as soon as a purchase is duly consummated or a subscription properly accepted, the stock affected is issued stock, and the subscribers or purchasers are stockholders of the company. Should a subscription then be canceled by mutual consent of the interested parties, or by due procedure of the directors of the corporation, the stock affected would resume its character of unissued stock. Certificates for stock should not be issued to the purchasers until the corporation has received the full agreed price.

Sometimes stock issued and paid for in full will be regained by the corporation by direct purchase, by gift or by other means. Such stock is not thereby retired, nor does it become again unissued stock, but is held as "treasury stock," and may be issued again as full-paid stock at less than the original price without involving the purchaser in any liability. (See § 40.)

### § 37. Full-Paid Stock.

In most of the states payment for stock may be made in anything of value. If the corporation has received the full face value for issued stock in cash or

in any other permitted form of payment, such stock is termed full-paid, and its certificates should be marked "Full-Paid" in order to indicate this fact. After stock has once been issued for full value, it may be sold at less than par without involving the purchaser in any liability for the difference.

If the corporation has not received the full face value for issued stock, the stock is but partly paid, and the purchaser of such stock may usually be held liable for the amount necessary to render the stock in his possession full-paid. This liability may be enforced either by the corporation, or, in event of its insolvency, by any creditor of the corporation.

It is to be noted, however, that if the corporation has agreed to accept less than the face value of stock in full payment, it is thereby estopped from collecting the deficiency, though the rights of creditors would not be affected by such agreement. Nor even if the corporation entered into such an agreement and issued certificates marked "Full-Paid" for stock sold thereunder, would a creditor be estopped from collecting the deficiency if the stock were in the hands of the original purchaser and the corporation were itself insolvent. If, however, such certificates had passed into the hands of innocent purchasers, both the corporation and its creditors would be estopped from any further exactions no matter how small the price originally paid for such stock.

Watered stock is stock for which the corporation has not received full payment in cash, services or prop-

erty. Generally the term is applied to any stock for which the corporation has not received an equivalent in assets. Stock is said to be more or less watered according to the amount of real value it represents. Watered stock is usually created by the issuance of stock in payment for property or services which have been overvalued; sometimes also it is created by the issue of stock insufficiently supported by the corporate property, as for instance, in cases of unwarranted stock dividends.

### § 38. Common Stock.

Common stock is the general or ordinary stock of a corporation with neither special privileges nor restrictions. If any portion of the stock is given special privileges or restrictions, that portion is thereby removed from the class of common stock and the remainder is alone common stock. Any statements made concerning stock are usually understood to apply to the common stock, unless some other class or classes are specified.

### § 39. Preferred Stock.

Preferred stock, as the term is usually employed, is that which has some preference as to dividends or assets over other stock of the same corporation. This preference is usually secured to it by special provisions in the certificate of incorporation, though in some states this may be done by by-law provision.

Preferred stock may be either cumulative or non-

cumulative as to dividends. If the latter, it must receive its preferred dividend for the current year before any dividend is paid the common stock, but if in any year its dividend fails or is only partly paid it loses the unpaid amount. The dividends of a cumulative preferred stock are, on the other hand, a charge against the profits of the company, accumulating in case of failure from year to year until paid, and taking precedence over any claims of the common stock. If its dividends are not paid in any year, or years, or are but partially paid, the amounts unpaid go over, or cumulate, and must be satisfied before the common stock receives anything.

Cumulative preferred stock is sometimes called guaranteed stock, but this is a misnomer as its dividends are not guaranteed and are not payable unless profits are earned. The better use of the term "guaranteed" is to designate stock of one corporation upon which the dividend payments have been guaranteed by another corporation,—an arrangement common among railroad companies.

It is usually provided that preferred dividends shall be paid in full before the common stock receives any dividend. If there are further profits after the preference dividends are paid, it is sometimes provided that the preferred stock shall share equally in these with the common stock. More often—and always, unless otherwise expressly provided—after the preferred dividends are paid in any year, the common stock re-

ceives an equal dividend if the profits are sufficient, and both kinds of stock then share alike in any further dividends declared in that year. At times, however, the preferred stock receives its preferred dividend, but does not participate at all in any further dividends of that year.

In some states it is provided by statute that preferred dividends shall not exceed eight per cent. Sometimes the charter provides that preferred stock may be redeemed out of the profits of the company after a certain number of years. It is often provided that in case of dissolution preferred stock shall be satisfied out of any assets of the company before the common stock receives anything. If this provision is not made, either by statute or by charter, the preferred stock in any liquidation of the corporation would first receive any dividends then due, but thereafter would fare exactly as does the common stock.

It is to be noted that preferred dividends may only be paid from profits. If there are no profits, or if the profits are needed for purposes of the business, preferred stock either receives no dividend, or if cumulative, its dividend passes over until profits are made. Unlike a bond, it is not a debt or liability of the corporation. Its owners are stockholders and not creditors, and failure of dividends ordinarily gives no cause of action against the company or its directors. For this reason preferred stock when available is usually considered a better means for raising money than an issue of bonds. (See § 89; also Form 5.)

#### § 40. Treasury Stock.

Treasury stock, in the better use of the term, is stock which has been issued for value and has by gift or purchase come back into the possession of the company. It may be held in the name of the treasurer, of a trustee, or of the company itself. For bookkeeping purposes it is accounted an asset of the company. It differs from unissued stock in the fact that it may be sold below par without involving the purchaser in any liability for the unpaid balance. So long as the treasury stock is held by the company it can neither vote nor draw dividends.

Treasury stock is most commonly found in those numerous cases in which corporations are organized to take over and exploit a mine, an invention, or other speculative venture. The owners of the property to be taken over assign this property in exchange for the entire capital stock of the corporation as soon as this latter is organized. The stock is thereby supposedly full-paid and its holders are not liable to either the corporation or its creditors. In order to provide a means of raising funds for the otherwise impecunious corporation, the holders of this full-paid stock donate back to the corporation, or to some trustee for the corporation, a certain proportion of their stock. This stock, being full-paid, may be sold by the corporation for whatever it will bring, and the fact that it is sold below par does not impose any liability on the purchaser. This is the end desired.

The term "treasury stock" is sometimes loosely and

inaply applied to unissued stock and even to stock subscribed for but as yet unpaid. Unissued stock represents nothing but the unexercised right of issue, and its designation as treasury stock is inaccurate and misleading.

#### § 41. Acceptance of Subscriptions.

Formerly before a corporation was organized it was customary to circulate lists and secure subscriptions to its stock. (See Forms 1-3.) The plan is still occasionally pursued. Under the form of subscription list usually employed in such cases the subscriptions must be accepted by the corporation before they become binding on either side. Until this is done the subscriber can not compel acceptance of his subscription, nor can the corporation prevent the subscriber from withdrawing his subscription if he sees fit. It is merely a proposition continuing until either accepted or withdrawn. As soon as accepted, however, it becomes a binding contract between the corporation and the subscriber, and the latter, by this acceptance, becomes a stockholder of the corporation. (See § 47.) If there are any outstanding stock subscriptions, they are usually accepted by the board at its first meeting.

The subscriptions of the incorporators do not require this formal acceptance by the corporation to become legally effective, the allowance of the charter by the state authorities acting as an acceptance of their charter subscriptions. The incorporators are there-

fore stockholders upon the allowance of the charter and are thereby qualified to act in the organization meetings.

Subscriptions after organization must also be accepted before they become binding upon either the subscriber or the corporation, and until this acceptance the subscriber is not a stockholder of the corporation.

#### § 42. Certificates of Stock.

A duly issued certificate of stock is a formal instrument under the corporate seal, signed by the authorized corporate officials and certifying that the party named therein is the owner of a specified number of shares of stock in the corporation issuing the certificate. When the owner sells this stock he effects the equitable transfer of title by the assignment of his certificate, though he is still the owner of record (See § 47) until the transfer is recorded upon the books of the corporation.

Each holder of stock for which the corporation has been paid in full, or for which it has been paid the agreed price, is entitled to receive a stock certificate signed by the president and the treasurer, or president and secretary, and sealed with the corporate seal. (See § 89.) This certificate states that the party named is the owner of so many shares of the company's stock, full-paid and non-assessable. This certificate is not the stock, though colloquially so termed, any more than a deed is the land it transfers. It is merely evidence of the ownership of stock, in such



form as renders the transfer of the stock from hand to hand a simple matter.

A stockholder whose stock has been paid for has a right to a certificate because he is already a stockholder. The certificate is merely a convenient evidence of the fact. It does not of itself constitute him a stockholder, or, except in the matter of convenience, affect his ownership of his stock in any way. It might be lost or destroyed (See § 45), but the party in whose name the stock stands on the books of the company is still a stockholder and entitled to the rights of a stockholder in spite of this loss. If his rights are questioned he may refer to the stock book and its record will control. (See §§ 46, 91.)

Stock certificates are usually bound in a substantial volume, numbered from one up, with a stub for each certificate upon which is kept a record of the facts relative to the issue of that certificate. This book of certificates is usually kept by the secretary. (See § 89.)

The owner of a stock certificate may assign it and thereby authorize the proper officials of the corporation to transfer the stock it represents. The ownership of record is not, however, changed until such transfer has been made upon the books of the corporation. If the owner wishes he may surrender a certificate and have it reissued in two or more certificates of the aggregate value of the surrendered certificate. These certificates may be in his own name, or in the name of others as he may direct.

The officials to sign stock certificates are in some states designated by the statutes. Where this is not the case they are usually prescribed by the by-laws.

#### § 43. Issuance of Certificates.

When the corporation is organized the stock certificates are in the hands of the secretary, ready to be issued to the rightful owners, or to the parties designated by them. It may be that preliminary subscriptions have been taken and the stock is to be issued to these subscribers, or the company may have been organized to take over property, and, under the conditions of exchange, all the stock of the company is to be issued in payment for this property, or subscriptions may be offered at the time. In any case the procedure as to the actual issuing of the certificates is much the same.

Usually when stock is issued for property, the entire amount of this stock is included in the one first certificate. If, as is generally the case, the stock is to be distributed among a number of persons, this original certificate is duly endorsed by the person in whose name it stands and is then turned back to the secretary with instructions for its reissue in such names and in certificates of such size as may have been agreed upon.

Instead of this arrangement, on written order of the party transferring the property to the corporation, the stock is sometimes issued directly to the parties in interest, or, in accordance with their instructions,

in a number of certificates, the total of the shares represented by these certificates equalling the full amount of stock to be issued. There is no legal objection to the plan, though the first arrangement is somewhat simpler.

If preliminary subscriptions have been taken, and payment has been made, or is proffered, or if subscriptions are offered at the time, the stock is issued in accordance with the instructions of these subscribers. The officers of the corporation must be sure that their instructions come from the proper parties, but beyond this have no concern as to the names in which these certificates are made out, or as to the equitable ownership of the stock involved.

When stock certificates are to be issued the secretary fills out the blank certificates in accordance with the requirements. These incomplete certificates are then turned over to the proper officials for signature. These do not affix the corporate signature but merely their respective official signatures. (See Forms 4, 5, 47.) When signed, the secretary seals the certificates with the corporate seal, enters all the important data concerning each certificate upon its stub, and the certificates are ready for issue. (See Forms 4, 5.) If the recipient is at hand he is required to sign the receipt upon the stub of the certificate at the time delivery is made. If he is at a distance a receipt is usually mailed with the certificate, and, when signed and returned, is pasted or otherwise attached to the stub of its certificate.

When transfer agents and registrars are employed the stock certificates pass through their hands before issue, and usually these agents take entire charge of the matter.

#### § 44. Transfers of Stock.

For convenience in transferring stock, each certificate bears upon the reverse side a blank form of assignment (See Form 6) which when properly filled out, or signed in blank and duly delivered, transfers the ownership of the stock represented by that certificate. When this form is filled out in its entirety, the ownership of the stock passes to the party named in the assignment. If, however, the form is signed in blank, *i. e.*, with the name of the assignee omitted, the signature being duly witnessed, the certificate may be passed from hand to hand or used as collateral, without further endorsement or formality, the *equitable ownership* of the stock following the certificate. The *ownership of record*, however, including the right to vote and share in dividends, remains with the original holder until the transfer is made upon the books of the corporation. (See §§ 47, 92.) For this reason when stock is purchased, the transfer should be made upon the books of the company without delay, unless it is designed to transfer the certificate to some one else very shortly, or unless the stock is by intention to be left in the name of the original owner.

If the holder of a certificate endorsed in blank wishes to make himself a stockholder of record, he

writes his name in the proper place in the blank form and also enters either the name of the secretary of the company, or his own name or the name of some other suitable person as attorney to make the transfer on the books of the company. (See Forms 6, 7.) This attorney, so designated, makes the transfer on the books of the company (See Forms 61, 62), surrenders the old certificates for cancellation, and the transferee thereupon becomes a stockholder of record, entitled to vote and to receive dividends. He is also entitled to a new stock certificate or certificates, which he usually receives forthwith. (See § 48.) The secretary upon receiving the surrendered certificate cancels it, attaches it to its stub, makes the proper entry on this stub and prepares the new certificate for issue.

When a transfer of stock is duly entered on the books of the company and a new certificate has been issued in the name of the party entitled thereto, such issue by the company acts as a guarantee of title, and it is not necessary for a prospective purchaser to investigate further than to make sure that the certificate is genuine and is properly in the hands of the holder.

#### § 45. Lost Certificates.

A stockholder's rights are not affected by the loss or destruction of his stock certificate. (See § 42.) Nevertheless its absence may involve much inconvenience, more particularly if the stock is to be sold, and the stockholder usually wishes a duplicate issued.

This is within the province of the directors, subject, however, to any by-law provision which may apply. Usually the by-laws provide that a bond must be required before a duplicate certificate is issued and this takes the matter out of the discretion of the board.

In the absence of by-law provisions restraining them the directors may, if they deem such proceeding advisable, order a new certificate issued in the place of a lost one. Inasmuch, however, as the corporation might be held responsible and lose the value of the stock if the lost certificate turned up in the hands of an innocent holder, the board usually will not order the issue of a duplicate certificate unless a proper bond of indemnity is given the company. (See Form 75.) At times the board will not even do this, but will decline to act until ordered so to do by a court having jurisdiction. Such an order relieves the directors of any responsibility in the matter and the duplicate certificate then issues as a matter of course. If the lost certificate has been actually destroyed, as by fire, and the fact is proven beyond all doubt, the board might safely order the issue of a new certificate without requiring bond, if the by-laws permit.

If a certificate is lost the secretary of the company should be notified promptly, as otherwise the stock certificate might be presented under circumstances which would justify him in making any desired transfer. After notification he would make such a transfer at his peril.

### § 46. Stock and Transfer Books.

Corporations should, and, in many states, must keep a stock book or stock ledger showing who are stockholders, their addresses, when they became stockholders and how many shares they hold. (See Form 60.) In some states the stock book must be kept open at all times during business hours for the inspection of stockholders and judgment creditors of the corporation. The stock book is the final authority as to who are the stockholders of the company entitled to vote and share in the dividends. Any statutory requirements should be fully observed. (See § 91.)

A book of blank forms for the transfer of stock, known as the transfer book, is required by law in some states and is commonly kept by the larger corporations as a convenient form of record. (See § 90; also Forms 61, 62.)

## CHAPTER VI.

### STOCKHOLDERS AND THEIR MEETINGS.

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#### § 47. What Constitutes a Stockholder.

The stockholders of a corporation are those who actually hold its stock, or who have subscribed for its stock and have had their subscriptions duly accepted by the corporation. A "stockholder of record" is one whose ownership of stock is duly recorded upon the books of the corporation.

At the time the corporate charter is granted, the incorporators are the only stockholders, the allowance of the charter having the effect of an acceptance of their subscriptions by the corporation. Any other subscribers, whether prior to incorporation or otherwise, must await the acceptance of their subscriptions by the company before they become stockholders, or are entitled to act as such.

The mere acceptance of their subscriptions constitutes the subscribers stockholders of the corporation. Neither payment of the amount subscribed, nor the issuance of stock certificates is necessary to the establishment of their status. If they fail to pay their sub-



scriptions, they have no right to stock certificates and their general rights as stockholders may be forfeited, but until this is done by due proceeding, they are stockholders, entitled to be recorded as such upon the books of the corporation and thereafter to vote and to exercise the other rights incident to membership in the corporation.

When outstanding stock is purchased and the certificate is transferred to the purchaser by endorsement, the transfer must be entered on the books of the company before such purchaser becomes a stockholder of record, entitled to vote, to share in dividends, and to receive a certificate of stock in his own name. Until that time he is the equitable owner of the stock, but he has not entered into formal possession and is not known or recognized in any way as a stockholder.

#### § 48. Rights of Stockholders.

The individual stockholder has but little part in the active management of the corporation. At the annual meeting each year he has the right to appear and vote in the election of directors and upon any amendment of the by-laws or other general matters brought before the meeting. The actual management then devolves upon the board he has helped to elect and he does not usually have any further direct concern with the affairs of the company until the next annual meeting.

The rights of holders of common stock may be stated as follows:

1. To be notified of and to participate in all stockholders' meetings, in person or by proxy, and to cast one vote for each share of stock held.

2. To share, in proportion to the amount of stock owned, in all dividends declared on the common stock.

3. In event of the dissolution of the corporation to share in like proportion in any assets remaining after all the corporate debts and obligations have been paid.

4. To inspect the corporate books and accounts.

It should be said, however, that this last right has been so restricted by late decisions and legislation as to amount to little more than the right to inspect the list of holders of stock as shown by the stock ledger.

Holders of preferred stock have the same rights, except as these may have been extended or restricted by the conditions under which the stock was issued.

#### § 49. Powers of Stockholders.

The powers of the stockholders may be summarized as follows:

1. Adoption or amendment of by-laws.
2. Election of directors.
3. Amendment of the charter.
4. Dissolution of the company.
5. Sale of the entire assets of the company.
6. The exercise of any specially conferred charter powers.

In matters like the amendment of the charter or the

dissolution of the company, the power of the stockholders is usually regulated by statute and in most cases two-thirds of the stockholders must agree before effective action may be taken.

If any illegal action is about to be taken by the directors, or by the officers or the other stockholders of the company, the individual stockholder may appeal to the courts for such relief as is possible. Sometimes proposed action of the directors that is distasteful to the majority of the stockholders may be prevented by the calling of a special meeting of the stockholders, and the amendment of the by-laws thereat in accordance with the necessities of the case. This course is, however, somewhat radical and is not available in most cases of disagreement between stockholders and directors.

The board of directors is the sole managing and controlling authority of the corporation. The stockholders make the by-laws by which the directors are controlled, and elect the directors by whom the corporate affairs are conducted, but beyond this they do not interfere in any way with the transaction of the corporate business or the management of the corporate property. All this rests with the board. Nor can the stockholders act directly for the corporation. A contract signed by every stockholder would not be the contract of the corporation and would not bind the corporation, unless also signed by its proper officers, or otherwise formally accepted by its directors.

### § 50. Liabilities of Stockholders.

A stockholder is liable to the company, or to its creditors, for any instalments remaining unpaid upon stock subscribed for by him. He may also be liable to creditors on any stock held by him, which is not full-paid. (See § 37.) Should dividends be paid from capital, instead of from profits, stockholders are liable to corporate creditors for any amount so received by them.

The stockholders of New York corporations are personally liable for all debts due to laborers, servants or employees for services rendered the corporation. This is an unusual provision found in but few other states, and proceedings under it are infrequent. Stockholders of California corporations are liable for their proportion of any corporate debts even though their stock may have been paid in full. Unusual liabilities are also found in a few other states.

Also stockholders of national banks and of most state banks and trust companies are held liable in case of the insolvency of their institutions for an amount equal to their original subscriptions.

As a rule, however, in the ordinary business corporation the holder of full-paid stock is in no danger of losing anything more through corporate failure or involvement than the amount he has actually invested in his stock. That is, if the corporate business is an utter failure, the holder of full-paid stock will lose the money he paid for his stock, but can lose nothing more save by his own action or consent. (See § 12.)

### § 51. Meetings.

In some few states the statutes provide that corporate action may be effected in certain stated cases by written assent thereto of all the stockholders or directors. Except when so provided by statute, corporate action may only be taken at meetings and in no other way. The written assent of all the stockholders is absolutely ineffective, nor can the directors act by signed agreement without a meeting.

In all matters where the procedure is not specifically prescribed by the by-laws the corporate meetings—both of stockholders and of directors—are governed by the usual parliamentary law, which it is the duty of the president to enforce. Some particular manual of parliamentary law is frequently adopted to control in all cases not covered by the by-laws. Occasionally the by-laws prescribe the manual to be used.

### § 52. Annual Meeting.

The annual meeting is the only usual regular meeting of stockholders and is as a rule the one occasion on which the stockholders participate actively in the affairs of the company. It must be held in the state in which the company is incorporated, unless the laws of such state expressly provide otherwise, and is usually required to be held in the principal office of the company. (See § 96.)

At the annual meeting the directors for the ensuing year are elected, the reports of the officers are presented, any amendments to the by-laws may be sub-

mitted and acted upon, and any affairs of the company requiring the action or attention of the stockholders may be presented for consideration. If any sweeping change in the business or policy of the company is desirable, it is usually authorized by action of the stockholders at this meeting. (See Forms 24, 25, 33, 35.)

### § 53. Special Meetings.

If action by the stockholders is necessary in the interim between the annual meetings, a special meeting must be assembled. Such special meeting of the stockholders is called by resolution of the directors, or by a call signed by the majority of the stockholders, or in any other way the by-laws may prescribe or permit. (See § 54.) This call is followed by a notice to the stockholders, giving the necessary details of the meeting to be held. The method of calling special meetings and of notifying them to the stockholders, as well as the general procedure in connection with such meetings, is usually prescribed in the by-laws and must be carefully followed.

The call for a special meeting (Form 27), and also the notice issued pursuant to this call (See Form 28), must recite the three essentials, viz.; the time, place and purposes of the meeting called, and every stockholder must have due notification. No business except that specified in the call and notice may be legally transacted at a special meeting.

Where the stockholders are not too numerous, much

time and trouble in assembling special meetings may often be saved by the stockholders uniting in a call and waiver of notice. (See Form 26.) If all will sign this, no further formality need be observed, and the meeting may be held forthwith. This is the usual procedure in the case of organization meetings which are, in fact, merely special meetings of the stockholders.

#### § 54. Notice of Meeting.

A clear distinction must be made between the call for a meeting and the notice by which such meeting is actually assembled. Colloquially the two terms are often confused. The call is a formal request or demand from the president, or some proportion of the directors or stockholders as may be prescribed by the by-laws, for the assembling of the stockholders or directors for specified purpose in special meeting. It is preliminary to the notice and is the authority under which notice of a special meeting is sent out. Regular meetings are not called, except in so far as the provisions of the by-laws in regard thereto serve as a standing call. In sending out notices of regular meetings the secretary ordinarily acts under authority of these by-law provisions alone. Special meetings must, however, be formally called and this call when properly issued, authorizes the secretary to send out notice of the desired meeting. Notices of special meetings should always specify the authority under which they are issued. (See Form 28.)

The by-laws should provide very explicitly the manner in which notice of both special and annual meetings is to be given stockholders. Every stockholder is entitled to due notice of the time and place of meetings in which he is interested, and this notice should be given such reasonable time in advance of the meeting—usually five to ten days—as will enable him to attend conveniently.

The statutes in many of the states provide for notice of annual meetings by publication in some suitable newspaper of the vicinity. In a large city this is a very uncertain method and should be supplemented by notice sent by mail to the last known address of each stockholder. (See Form 25.)

If the by-laws specify the time and place of regular meetings, the neglect of the secretary to send out or publish the prescribed notice will not ordinarily invalidate the proceedings at such meeting. (See Form 24.) The proper notice should always be sent, particularly if important action is to be taken, but, unless the conditions are unusual, the by-law provisions are held to act as a sufficient notice of the time and place. A special meeting is, however, invalidated by failure of notice unless otherwise expressly agreed by every party entitled to notice. (See § 53.)

Notices of regular meetings generally specify the purposes of the meetings they announce. This is not essential—unless matters of special importance are to be considered—but is customary. Notices of special meetings should always state the purposes of the meet-



ings called and no business may be legally transacted at such meetings—save by consent of every stockholder of the corporation—unless it has been stated in the notice.

### § 55. Quorum.

The quorum, *i. e.*, the proportion of the outstanding stock which must be present to enable the transaction of business at a stockholders' meeting, should be prescribed in the by-laws. The usual provision requires the presence of a majority of the outstanding stock. When a quorum is present, a majority of this quorum has power to decide any question that is brought before the meeting.

If a quorum is not present at any meeting, the stockholders in attendance are not able to transact business, but they may adjourn from day to day, until a quorum is secured, and the meeting held. This saves the trouble, formality and possible delay of calling another meeting and is sometimes a very convenient procedure.

In the absence of statutory regulation, any desired proportion of the stock may be designated by the by-laws as a quorum for the transaction of business. For obvious reasons a quorum should usually require a majority of the outstanding stock. If there are no by-law, charter or statutory requirements as to the proportion of stock necessary to constitute a quorum, the common law rule prevails and the holders present

—provided there are more than one—form a quorum capable of transacting business.

### § 56. Voting.

Only stockholders of record (See § 47) are entitled to vote at annual and special meetings of the stockholders. Each stockholder of record is entitled to one vote for each share of stock held in his name. In elections of directors this means that for each share of stock held the stockholder is entitled to cast one vote for each director to be elected,—that is, if five directors are to be elected he may cast one vote for each of these. Under the cumulative system of voting, which is designed to secure minority representation on the board, the stockholder still casts one vote for each director to be elected, but he may cast all five votes—if five directors are to be elected—for any one candidate or may distribute them among the five as he sees fit. (See §§ 112, 135.)

Voting at elections of directors is usually by ballot. (See Forms 69, 69a.)

### § 57. Proxies.

Any stockholder entitled to vote at a stockholders' meeting may usually give a proxy, or—as it may otherwise and properly be termed—a power of attorney empowering some other party to attend at stockholders' meetings as his representative and vote upon his stock in his stead. If this right of substitution is not given by the statute law, it should be provided

for in the by-laws. It is not a common law right and does not exist unless expressly given by some competent authority.

By means of proxies important meetings are often held with only a few persons present, enough stock being represented by proxies in the hands of those present to make up a quorum and enable a legal meeting to be held. The person holding a proxy is frequently himself designated the "proxy" of the person he represents.

In some states the life of proxies is regulated by statute, as in New York where a proxy must be executed not more than eleven months before it is used, in New Jersey where three years is the legal limit and in Maine, where a proxy must be executed within thirty days of the date of the meeting.

Proxies, unless the holder has himself some interest in the stock he represents, are revocable at any time, and this notwithstanding the fact that the terms of the particular proxy may state that it is irrevocable. The mere presence of the owner of stock at a meeting acts, if he so desires, as a revocation of proxies given by him for that meeting. A second proxy given while another proxy on the same stock is outstanding acts, when presented to the secretary, as a revocation of the first proxy.

A proxy may be so drawn if desired as to convey a limited right, such as to vote only on some special subject or in some particular way, or at some special meeting. A stockholder may, if he wish, give a

proxy for a specified portion of his stock, reserving the right of representation on the balance to himself or conveying it to some one else by a second coexistent proxy.

A person holding a proxy, unless limited by the terms of the proxy itself, has every right of participation in the meeting at which he acts that the stockholder would himself possess if personally present. (See Forms 16, 32-34.)

#### § 58. Election of Directors.

The annual election of directors is the most important event in the corporate calendar, though in small corporations when there have been no material changes of stock during the year the election is frequently omitted, the old board merely holding over for another term. If all the stockholders acquiesce, there is no legal objection to this procedure.

Owing to the importance of the subject, many states have passed special laws regulating the election of directors. These usually provide that the election must be by ballot and must be conducted by inspectors of election appointed for the purpose. The by-laws should provide for all details relating to elections. (See § 56; also Form 13, Art. I, Sec. 5.)

#### § 59. Officers of Meetings.

In the smaller corporations the regular officers of the company usually act as the officers of stockholders' meetings. In the larger corporations the stockholders

customarily have their own officers of meetings, who may or may not be the regular officers of the company.

If the stockholders are to have their own officers of meetings, the by-laws will usually, though not necessarily, so state and also provide for the election or appointment of these officers. In the absence of any by-law provision for officers of meetings, a meeting of stockholders should be called to order by some member present, and a president, or chairman, and a secretary, elected or appointed for the occasion.

If the regular officers of the corporation are to serve at stockholders' meetings, this should be prescribed by the by-laws, as otherwise they have no authority to so act. (For officers of directors' meetings see § 66.)

## CHAPTER VII.

### DIRECTORS AND THEIR MEETINGS.

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#### § 60. Status and Functions of Directors.

The board of directors is the most important feature of the corporate organization. Elected by the stockholders, it has the entire management of the corporate affairs. In its turn the board elects the officers of the corporation, through whom it acts. It also employs such other agents and employees as may be necessary for the proper conduct of the corporate business.

The directors of a corporation are held to be its agents, and, in a measure, trustees for the stockholders. It is their duty to act with all proper care and diligence in looking after the affairs and property of the corporation, and they are responsible for its proper management.

Not infrequently the directors are styled "officers" of the company. This designation is legally correct but as it tends to produce confusion it is not employed in the present volume.

The directors are usually elected at the annual meet-

ing of the stockholders to serve for the ensuing year. Should the annual meeting be omitted, or should the stockholders fail to elect a new board at the annual meeting, the directors then in office continue to serve until the election of their successors and this whether such continuance of their term is specified in the by-laws or not. Until the election of their successors, these "hold over" directors have every power that they possessed before the expiration of their elective term.

#### § 61. Number and Authority.

The number of directors composing the board is in many states fixed within certain limits by statute. In most of the states there must be at least three directors. The maximum number is not usually designated. For all ordinary corporations a small board is most convenient, and, as a rule, most effective. If the board is large the individual responsibility of the members is much diminished or lost, prompt effective action is practically impossible and at times it is even difficult to secure a quorum for the transaction of necessary business.

When the board is unwieldy or difficult to assemble, the actual administration of the corporate affairs is usually delegated to an executive committee composed of from three to five members. (See § 73.) By this device the prompt and effective action of a small body is secured for the actual direct management, while the board in which rests the nominal control—and

the actual final authority—may be as large in size and as irregular in meeting as the conditions dictate. A large board is not infrequently necessary or very desirable in order that all interests may be represented, or that stockholders of special weight and influence may be included.

The board elects the corporate officers, appoints such other agents as may be necessary and has entire charge of the property, interests, business and transactions of the company. Unless with the express sanction of the stockholders its authority does not extend to radical action, such as the sale of the entire assets of the company, which is a virtual winding up of the corporate business, but does cover all ordinary corporate transactions. In these matters the directors have the widest discretion and are practically independent of the stockholders, except in so far as these latter control by means of charter or by-law provisions. To such provisions the directors are amenable.

The directors can only act collectively and in a regular meeting or in a duly assembled special meeting. A single director unless authorized thereto by resolution of the board, or specially empowered in some other way, has no standing of any kind in corporate matters above that of any other stockholder.

## § 62. Liabilities.

Directors are held to be *quasi* trustees for the stockholders. As such, they are liable for any wrongdoing; also for any neglect that results in loss to the



corporation. For instance, they are liable if they issue stock as full-paid which is not full-paid, or pay dividends out of the capital of the company when there are no profits, or otherwise abuse their power, or grossly mismanage the affairs of the company. In short, they have undertaken a trust, and they must conduct themselves in its administration as would careful business men in the management of their own private affairs.

In addition to this general liability, special laws have been enacted in many states, making directors liable criminally, as well as civilly, for certain acts, such as declaring illegal dividends, making loans to stockholders out of corporate funds, making false reports, etc.

As a trustee, a director must have no interest adverse to the interests of the company, and he should not involve himself personally in any contract or business in which the company is concerned unless the matter in hand is clearly to the advantage of the company. The courts scrutinize transactions of this kind closely and an objecting stockholder may have a contract between a director and the company set aside if he can show that undue influence has been used to secure such contract, or that it is not to the best interests of the company.

In many of the large corporations of the present day, the corporate operations are so extended and diversified that prohibition of contracts in which their directors are interested would seriously restrict the

corporate business. For this reason the by-laws of these corporations frequently provide that corporate contracts in which the directors are interested, directly or otherwise, may be entered into under certain prescribed conditions. These usually provide that a majority of the directors or a majority of a quorum, outside the interested member or members, must vote for such contracts, or that they must be authorized by a certain prescribed number of directors who are not interested.

### § 63. Qualifications.

In most of the states the statutes require that directors shall be stockholders of the company; also, usually, that one member of the board shall be a resident of the state of incorporation. In some of the states the stockholding requirement may be waived by proper provision in the charter or by-laws. If directors are required to be stockholders, any director disposing of his stock thereby vacates his office, and the position he occupied is vacant and may be filled by the board without any formality beyond the election of his successor. One or more shares of stock are often given to a party desired as a director in order to qualify him for the position. Such directors are termed "dummy" directors. (See §§ 123, 147.)

In most, if not all of the states, married women may act as directors, as may, generally, any person capable of contracting.

#### § 64. Vacancies.

A board of directors may continue to act though there be vacancies, provided sufficient members remain and are present to make up a quorum. As a measure of safety, however, vacancies should be filled as they occur and authority to do this should be conferred on the board by the by-laws. The board does not possess this power unless it is specifically given.

Directors can not be removed, either by the other directors, or by the stockholders, unless such power of removal is expressly given by the certificate of incorporation, the by-laws, or the statutes of the state. Where directors may be removed for cause, charges of sufficient weight to justify the removal must be preferred; due notice must be given the accused person, and the charges must be substantiated before his position may be declared vacant.

#### § 65. Classification.

In the larger corporations to avoid the possibility of sudden changes of policy that might result from a sweeping change in the personnel of the board, the directors are frequently divided into classes, differing only in the time of their election. The usual number of classes is three, and, after the first election, the directors of one of these classes are elected each year and hold over for three years. Under this arrangement, after the first election, only one-third the total number of directors is elected each year, and three years are required to make a complete change of the board.

It is obvious that the plan completely prevents any sudden change in the composition of the board, unless by general consent and arrangement, and therefore insures stability in the management of the corporation. Such classification is not usual in the smaller corporations and would not as a rule be of any advantage to them.

#### § 66. Regular Meetings.

The times and places for regular meetings of the directors are fixed by the by-laws. Monthly meetings are generally prescribed, but the frequency of such meetings will be determined entirely by the requirements of the particular corporation. In a small company one regular meeting a year may suffice. Should action of the board prove necessary in the interim, special meetings may be readily called, or be held by consent whenever the occasion arises. As a general rule directors must hold their meetings in the state of incorporation and these meetings are usually held in the principal office of the company. (See § 96.) They may be held elsewhere in the state if permitted by the by-laws, or without such permission, by unanimous consent of the members of the board. A meeting outside the state is not legal except where expressly permitted by the statutes of the state.

Directors can not give proxies to others to act for them at meetings of the board, but must be personally present if they wish to be represented.

The officers of the company are also the officers of

the board and act as such at all board meetings. An exception to this general statement must be made as to some of the larger corporations in which a special presiding officer termed the chairman of the board is not uncommon.

#### § 67. Special Meetings.

The by-laws should clearly prescribe the method by which special meetings of the board are to be called. Commonly it is provided that the president or two or more of the directors may call such meetings. Calls for special meetings must specify the time, the place and the business to be transacted, these details must be repeated in the notice, and no other business than that so specified may be transacted at that meeting. (See § 68.)

If, however, *all* the directors meet or are present and consent, a special meeting may be held then and there, without call or notice of any kind, and in the absence of objection any proper business whatsoever may be transacted. Where the board is small and easily assembled such a "consent" meeting is convenient and entirely unobjectionable. As all are present and consent, every formality is thereby waived and no dispute as to the legality of such a meeting can arise later. The presence of all the directors at the meeting and their consent thereto should, however, be very clearly evidenced, either by proper entry in the minutes, or, better, by a written statement signed by all the directors.

When this method can not be followed, a call and waiver of notice, signed by all the directors, makes it likewise possible to hold an immediate meeting without further notice. (See Form 30.) When neither of these methods is practicable, the formalities prescribed by the by-laws for the calling of special meetings should be closely followed. (See Form 30a.)

#### § 68. Notice of Meetings.

The members of the board are supposed to know when and where its regular meetings are held, and, even though notice be required by the by-laws, failure of notice will not invalidate the proceedings of such a meeting. Notices should, however, always be sent out, both to insure the attendance of the members of the board at the meeting, and to remove any possibility of dispute or trouble as to its proceedings. Usually such notices specify the important matters that are to come before the meeting.

With special meetings the case is quite different. Here due notice as to the time, place and purposes of the meeting is absolutely essential and if any director does not receive this notice he is not bound by the action of such special meeting and may have its proceedings set aside if he chooses to take the necessary steps. Therefore the directions of the by-laws should be followed to the letter both as to the call and notice of special meetings, and, whether required by the by-laws or otherwise, every notice should distinctly spe-

cify the time and place of the meeting and the business to be considered thereat. (See Form 31.)

As has been stated (§ 67), notice of special meetings may be waived and the meeting held at any time and place and any business transacted thereat by agreement of all the directors.

#### § 69. Quorum.

A majority of the board is usually necessary to constitute a quorum. This means a majority of the whole board, not a majority of some reduced membership caused by resignations or removals. A majority of the prescribed quorum decides the action of the board. Unless regulated by statute the charter or by-laws may prescribe the number necessary to form a quorum. To allow less than a majority of the board to constitute a quorum is not uncommon but is a measure of doubtful wisdom.

#### § 70. Election of Officers.

The board can only act through officers and agents, who are elected or appointed by the board. Usually the election of officers is held at the first board meeting in each year after the new directors for the coming year have been themselves elected. This is so arranged in order that the new directors may elect their own officers and thereby secure an official staff in harmony with their views and policy. The usual executive officers are a president, vice-president, treasurer

and secretary. Two offices may be held by the same person if the duties are not incompatible. (See § 75.)

The directors have the right to fill any official vacancy occurring during the year. They have no right, however, to remove officers—except for cause—unless such power is expressly given them by the by-laws, the charter, or the laws of the state. In some few states broad rights of removal are given the directors by statute.

In case of any failure to elect officers at the appointed time the old officers hold over until their successors are elected. Until superseded these old officers have the same power to perform the duties of their respective offices that they enjoyed before the expiration of their term. If the board fail to elect officers at the appointed time, directors may, if they see fit, hold such election at the next regular board meeting, or at a special meeting called for the purpose.

#### § 71. Compensation of Directors.

In the larger corporations it is generally provided that a director attending any meeting of the board shall receive a certain fee for his attendance. The amount of this fee is best fixed by the by-laws and ordinarily ranges from five to twenty dollars. If a director is absent from a meeting, his fee for that meeting is lost to him. Except for these fees directors do not usually receive compensation unless they



perform some special service outside the ordinary duties of a director.

If the directors are to receive payment for their services, that fact should be explicitly stated in the by-laws. In the absence of any such provision the services of the directors are supposed to be given without charge.

### § 72. Power to Pass By-Laws.

Originally by-laws were passed by the stockholders alone, and one of the principal purposes of these by-laws was to define and limit the action of the directors and officers of the company. In the present day this has been modified in some of the states by statutes giving the directors more or less power over the by-laws. In some other states such power may be given the directors by suitable charter and by-law provisions.

Under the New Jersey laws it is possible to give the directors absolute power to make and alter the by-laws, and in the great corporations formed in that state for the purpose of combining industrial enterprises and for other large undertakings, such authority is usually conferred upon them. In New York the directors may neither repeal nor alter by-laws adopted by the stockholders, but are allowed to pass additional by-laws in harmony with those of the stockholders. The New York rule would seem to go as far in this direction as is safe for the ordinary corporation. (See § 31.)

### § 73. Executive Committee.

In the larger corporations the board of directors is generally composed of a number of members and these members are usually busy men living in different parts of the country and difficult to assemble. Many of them are on the board solely as representatives of special interests, or because of wealth or influence, and not because of peculiar fitness for the conduct of the corporate business. Under such conditions the board is not an effective instrument. Its slow, formal and uncertain operation is then advantageously replaced by the prompt and efficient action of a small, selected executive committee.

The membership of this committee is seldom less than three or more than five. Too large a committee would involve the very evils it was created to avoid. It must be composed of members of the board and this membership is supposed to be made up of those most competent to manage the corporate affairs. Usually for the interim between board meetings all the powers of the board are given to this committee.

The executive committee appointed with such powers is the real managing body of the corporation. It is subject to the instructions of the board, but this latter body as a rule merely supervises the work of the committee, acting only in those matters which are referred to it by the committee or which are of unusual importance. The power of the committee is generally defined by the charter or by-law provisions under which it exists.

When the board of directors is small, an executive committee is not only unnecessary, but may become an actual menace to the interests of the corporation. In such cases the committee is apt to improperly monopolize the management of the corporation, the board being excluded from its rightful direction of the corporate affairs.

#### § 74. Finance Committee.

In the larger corporations, in addition to an executive committee, a finance committee is often provided to supervise and direct the financial affairs of the company. For the interims between board meetings the scope, powers and authority of this committee in matters relating to the finances of the company are, as a rule, the same as those of the board. A finance committee is superfluous in the smaller corporations.

The finance and executive committees are permanent, or standing committees. Still other standing committees are found in some of the large corporations.

## CHAPTER VIII.

### OFFICERS.

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#### § 75. Enumeration ; Qualifications.

The term "officer" is usually applied to those agents of the corporation who are elected or appointed by the board of directors as the direct executive representatives of the board and of the corporation. Technically the directors are themselves officers, but this application of the term is apt to cause confusion. (See § 60.)

The necessary officers of the corporation are the president, secretary and treasurer. In the smaller corporations when the duties are compatible two of these offices are frequently held by one person. In the larger corporations the number of officers is increased by the addition of one or more vice-presidents, assistants for the secretary and treasurer, a managing director or general manager, an auditor and a counsel for the company. Sometimes also a chairman of the board and officials for the standing committees are added.

The officials named, are, for the most part, elective,

and, with the occasional exception of the general manager and the assistant officers, report directly to the board or to the standing committees. All these are officers of the company while those lower in its service are ranked as agents and employees.

The annual election of officers usually follows closely the election of directors, being held as soon thereafter as the newly elected board can be properly assembled. This is done in order that the new directors may choose officials acceptable to them and in harmony with their views. (See § 70.)

The president and vice-president, as presiding officers of the board, should be chosen from its membership. Save as to these, the officers need not be selected from the board though the treasurer is frequently chosen from among the directors and the other officials are so selected when convenient. Financial standing or ability is a necessary qualification for the treasurership of the larger corporations. A knowledge of the duties of the position would seem to be a necessary qualification for all corporate officials, though other considerations frequently prevail.

#### § 76. Vacancies and Removals.

The directors have power to fill any vacancies that may occur among the officials of the corporation, such interim appointments holding for the unexpired term. Officers can not be removed at the pleasure of the board unless the by-laws, charter or statute law gives the directors this power. The directors may, how-

ever, remove an official for good cause without special authorization.

When the removal of an officer for cause is contemplated, charges should be made, the accused be notified of these charges and full opportunity be allowed him for a hearing. Should the removal be made without such procedure, or with it, but on insufficient grounds, both the corporation and the directors personally might be liable in damages.

#### § 77. Liabilities of Officers.

Officers are liable generally for all damages resulting from their negligence or active wrong-doing in connection with official duties. In addition the laws of most states impose upon them special liabilities for various acts and omissions, such as the failure or refusal to allow proper inspection of the stock books of the company, the making of false reports or certifications, loaning corporate funds to stockholders, and other similar cases of neglect or malfeasance.

#### § 78. Compensation of Officers.

Usually officers of a corporation are paid for their services and if necessary may collect such payment from the corporation by process of law. If, however, they stand in any relation to the corporation—such as that of a director or stockholder—that would justify the inference that they were to serve without compensation and there is no by-law, resolution of the board, or other well-understood agreement for official sala-

ries, they have, generally speaking, no claim to payment for their services. Nor in the absence of provision for compensation is it ordinarily allowable for the directors—unless with the consent of all the stockholders—to vote a salary or payment to a director or stockholder for services as an officer after such services have been rendered.

It is therefore advisable in all cases that the intention as to compensation of officers shall be clearly stated in the by-laws,—either that officials shall serve without compensation, or with salaries specified in the by-laws or with such salaries as the board shall designate at the time of their election.

Occasionally such liberal salaries are paid to the corporate officials as to amount practically to a division of the corporate profits among them. In close corporations where all the stockholders are either officials or satisfactorily represented on the official staff this is at times a matter of agreement. Under such conditions the arrangement is legitimate and unobjectionable. Occasionally, however, the device is adopted in order to deprive the stockholders of profits which would otherwise and properly be received by them as dividends. Where any apprehension of such improper practices exists, the possibility should be prevented by by-law restrictions on salaries. (See §§ 115, 139.)

#### § 79. Powers and Duties of Officers.

The officers of the company carry out the instruc-

tions of the board, and outside the routine duties assigned them by the by-laws, or by the statutes, have no independent powers or authority of any kind. The duties of officers should be clearly stated in the by-laws, but, if not, may be prescribed by the board within the general limits set by custom. The usual duties performed by the respective officials of the corporation are much the same in the different corporations, varying somewhat with the size of the corporation and the nature of its business.

It is to be noted, however, that outside of the few statutory duties prescribed in most states, such as making reports, filing statements, etc., the duties of the various officials are absolutely within the discretion of the stockholders, and may, by proper by-law provision, be fixed in accordance with their wishes. Occasionally this power is exercised so as to materially change the usual relative status of the different officials.

In the present chapter the powers and duties assigned the various officials are those customary in the ordinary corporation of moderate size.

#### § 80. The President.

The president is the most important officer of the corporation. He presides over the meetings of the board, and, if authorized thereto by the by-laws, over the meetings of the stockholders. He can bind the corporation in most routine matters, and usually affixes the corporate signature to all important instru-



ments requiring such signature. He must, however, be specially authorized by the board in order to bind the corporation in matters of unusual importance or outside the regular routine. (See § 98.)

The president should exercise a general supervision over all the corporate business, and, as necessary or required, report to the board and to the stockholders as to the condition of the company's business.

The president is sometimes authorized to affix the corporate seal and is frequently required in connection with the treasurer to sign or countersign the corporate checks. He is also frequently given the same power to endorse negotiable paper and to endorse checks for deposit as is given the treasurer. He is also usually required with the treasurer or secretary to sign the certificates of stock.

#### § 81. The Vice-President.

Vice-presidents, designated and ranked as first, second, third and so on, are elected in accordance with the corporate needs. These in the order of precedence perform the duties of the president in the absence or disability of that official or in his refusal to serve. Also in the larger corporations special duties, or a portion of the president's usual duties, are assigned to one or more of the vice-presidents.

Frequently the number of vice-presidents is swelled merely to provide honorary positions for members of the board. In the smaller corporations, on the other hand, the position of vice-president is sometimes

omitted entirely, its duties being assigned the treasurer, or the treasurer being elected as both vice-president and treasurer.

A vice-president may take the place of the president only in the absence, disability or refusal of this latter to act. At other times a vice-president has no more power to act for the president, or as president, than has any other officer of the corporation, and should he so act it would be ineffective and his action would not be binding on the corporation. Also the absence, or disability of the president must be real and his refusal to act must be a distinct refusal to fulfill the general duties of his position, before the vice-presidents are competent to perform his duties. In event of any question as to the competence of a vice-president to act the board of directors must judge.

## § 82. The Secretary.

The secretary's usual duties require him to keep a record of the proceedings of the stockholders and directors, to send out notices of meetings, to issue stock certificates, to keep the record of stock and stockholders, to notify officers of their election, to sign or countersign such corporate instruments as the board may direct, and to preserve and keep safely all such corporate instruments and records as do not pertain to the work of the treasurer, and are not otherwise assigned. (See §§ 87-91.)

The secretary usually has the custody of the seal and is required to attest it when it is affixed to any

instrument requiring the formal corporate seal. (See §§ 97, 98; also Form 48.) Also the secretary is frequently required to sign certificates of stock with the president, though in some states, as New Jersey, he may not do so, the statutes requiring the signature of the president and treasurer.

The secretary is frequently given active duties in connection with the business of the corporation, but these have no necessary relation to the duties of his official position.

### § 83. The Treasurer.

The treasurer has charge of the funds and securities of the company. If these are of any considerable amount he should be required to give bond for the faithful performance of his duties and the due return of the cash and securities entrusted to him. (See Form 74.)

Usually the treasurer is directed by resolution of the board, though sometimes by by-law provision, to deposit the moneys of the company in the name of the company in some designated bank or other depository. His checks are usually required to be countersigned by the president. He frequently has sole power to endorse negotiable paper and checks for collection or deposit.

The treasurer either acts as bookkeeper, or the bookkeeping is done under his direction and he is supposed to maintain a general supervision of the financial interests of the company. (See § 86.)

Like the secretary, the treasurer may have other duties assigned him in the conduct of the corporate business that do not necessarily pertain to his office.

#### § 84. General Manager.

The general manager while an officer of the company is not so in the same sense as is the president, secretary or treasurer. He is accounted an officer—in contradistinction to the employees—only because he is selected by and usually reports to the board. He has no concern with the corporate functions, having charge only of the ordinary business operations of the company which he manages exactly as he might the affairs of a firm or individual. At times he is directed to act under and report to the president. If the by-laws did not specifically provide for the election of a general manager, the board would still have authority to appoint or employ such official and prescribe his duties and salary just as it might appoint any other employee of the company.

The powers, duties, and compensation and term of office of the general manager are usually fixed by the by-laws, otherwise by the board of directors. Generally this officer enters into a contract of employment with the corporation and in such case the contract provisions control.

#### § 85. Counsel and Auditor.

In the larger corporations an attorney or firm of attorneys to represent the corporation is retained as

a regular and permanent feature of the management. Such counsel has no independent authority to act for the corporation, even in matters of litigation, save as such authority is expressly given, usually by action of the board. The principal duties of counsel are to confer with and advise the officers of the corporation in matters of such importance or delicacy as to require legal guidance; to prepare or revise all important contracts or other instruments of the company, and to represent and act for the company when litigation does occur.

An auditor is also usually appointed or elected by the larger corporations. The duty of this officer is to supervise the whole system of corporate accounts and business records. Such officer must of necessity be an expert accountant. His authority and duties are usually prescribed by the by-laws, or otherwise are fixed by the board.

## CHAPTER IX.

### THE CORPORATE RECORDS.

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#### § 86. The Treasurer's Books.

Usually the treasurer's books are merely the books of account of the corporate business. If the treasurer is not himself the bookkeeper of the company, he is still supposed to supervise and be responsible for the corporate accounting.

There is no system of bookkeeping peculiar to the corporation. Each company keeps its accounts in accordance with its own methods and the general principles of bookkeeping. In a large corporation conducting an extended business, the books are numerous, but this is because of the scope of the business, not on account of any peculiarities of corporate bookkeeping. A capital stock account must be introduced. A dividend account will be necessary to record the disposition of divided profits. A few other accounts peculiar to the corporate form are necessary. A stockholders' ledger may be required. Outside of these, the books and the accounts they contain are

much the same as they would be if the business were unincorporated. (See §§ 83, 150.)

### § 87. The Secretary's Books.

The books kept by the secretary are as follows:—  
(1) the minute book, (2) the stock certificate book,  
(3) the transfer book and (4) the stock ledger.

The minute book contains the records of the corporate proceedings. (§ 88.)

The stock certificate book contains any unissued certificates, attached to their stubs; also the stubs of all certificates that have been issued and usually any certificates that have been surrendered for reissue. (§§ 89, 119.)

The transfer book contains blank transfers to be filled and executed when stock of the corporation changes hands. (§§ 46, 90; also Forms 61, 62.)

The stock ledger or stock book shows the name and residence of each stockholder with the number of shares owned by him. (See §§ 46, 91; also Form 60.)

Large corporations frequently appoint a transfer agent to take charge of the stock certificate book, the stock ledger and the transfer book, thereby relieving the secretary of much labor and responsibility.

### § 88. Minute Book.

It is a matter of the greatest importance that the proceedings of the meetings of stockholders and directors, and, in the larger corporations, of the stand-

ing committees as well, shall be recorded accurately and properly. This duty belongs to the secretary and the book or books in which his records of the corporate proceedings are entered is called the minute book.

"The minute book of a corporation properly kept is legal evidence of the proceedings of its stockholders' and directors' meetings. The secretary is its custodian and its entries should be made by him alone. Any director has the right to inspect this book at any suitable time. A stockholder usually does not have this right.

"The minute book is ordinarily a blank book of the style termed 'record' by stationers. It may be had at any price from plainly bound books at fifty cents or less, up to elaborately bound and specially printed books costing from five to twenty-five dollars or even more. A reasonably good and substantially bound book is always to be desired.

"The minute book varies in size and general form according to the taste or requirements of the secretary. A common and convenient form is  $8\frac{1}{2}$  by 13 inches. Sometimes the book is specially made, of a size and style to match the other corporate records. For a small corporation with few meetings, a book containing one hundred pages will usually be found ample.

"When the minutes are kept in a substantially bound volume with longhand entries succeeding each other in regular order, later additions or insertions



are difficult if not impossible, and their evidence as to proceedings at the company's meetings is difficult to controvert.

"Minutes are, however, not infrequently written with the typewriter on sheets of thin paper, which are then pasted in the minute book. Also at times loose-leaf minute books are employed, in which the pages may be removed, and, after the minutes are written upon them, be reinserted in the book. When either of these plans is followed, substitutions and alterations in the minutes may be made with comparative ease and their value as evidence is diminished.

"To avoid this objection to the convenient loose-leaf minute book, each page is sometimes water-marked with its proper number in such manner that substitution is extremely difficult and practically impossible. The same end is sometimes accomplished by the inscription of the president's and secretary's signatures or initials on each page, making substitution without the participation of these officials impossible. It is obvious that this latter method of verification may also be effectively employed when minutes are pasted into the minute book."\*

The first pages of the minute book should contain a copy of the charter or certificate of incorporation of the company. This may be the certified copy received from the Secretary of State (See § 117), bound or pasted into the minute book; or, equally good, a careful and legible copy made by the secretary directly on

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\*Conyngton on Corporate Management, pages 196, 197.

the first pages. Following the charter should come the by-laws of the company, likewise carefully and legibly copied, and beginning at the top of the first page after the charter. The by-laws should be followed by a certificate signed by the secretary and stating that, as written, the foregoing by-laws are a true and correct copy of the by-laws adopted at the meeting of the stockholders of the company, held at such a time and place. (See Form 14.)

Two or three pages next succeeding the by-laws should be left blank for the entry of any amendments. Then should follow the minutes of the first meeting of stockholders, then the proceedings of the first meeting of directors, and thereafter the minutes of stockholders' and directors' meetings in due sequence as held. Each meeting should begin at the top of its proper page, and no blank pages should be left between the records of the different meetings.

Usually the minutes of the directors and of the stockholders are kept in the same volume. In the larger corporations, however, separate minute books are kept for the respective records of the directors and stockholders. There is no objection to separate books in the smaller corporations if so desired, and, on occasion, they are necessary.

When notification of some action taken at a meeting is necessary, as for instance the acceptance of a contract or proposition, a transcript of such part of the minutes as applies is made by the secretary and is evidenced by his signature and the seal of the com-

pany. This is then delivered to the parties in interest as formal and sufficient notice of the action taken. (See Forms 52-54.)

The minutes given in the latter part of the present volume (See Chs. xxii, xxv) are in conventional form. There is, however, no set form nor absolute rule as to how the minutes of a meeting shall be recorded, and any clear statement in good English is legally sufficient. Usually the conventional arrangement will be found clearest and most concise, and should be followed.

During the progress of a meeting many letters, reports, contracts and other instruments are likely to be presented. In some cases the secretary is instructed to enter certain of these upon the minutes, but in other cases it rests in his discretion whether these documents be entered in full, in part, or be entirely omitted. Generally it is sufficient if they be filed and preserved, with only such reference to them in the minutes as will suffice to identify them, or explain their connection with the action taken. If, however, the matters to which they relate are important, they might well be entered in full, or, as it is phrased, "spread upon the minutes." When this is done the minutes constitute a complete record in themselves, which is sometimes a matter of much importance.

The minutes should be written up in permanent form as soon after the meeting as possible, and while its events are fresh in the secretary's mind. If he is in

doubt about any part of the proceedings, he may ask assistance from the president or members present at such meeting. He, however, must take the final responsibility of making the authoritative record which he signs.

The secretary should spare no pains to secure accuracy in the minutes, for they are the legal evidence of the action taken at the meetings recorded, and the authority for any action of the officers required thereby; and they will probably be referred to and acted upon before the formal approval of the stockholders, or directors, relieves the secretary from further responsibility.

The minutes of a meeting are signed by the secretary and by the presiding officer of that meeting. The minutes so evidenced should be read at the next succeeding meeting of the body to which they pertain, and, if no objection is offered, should be approved. The stockholders could not approve the minutes of a board meeting nor could the board approve stockholders' minutes. Neither would minutes of a meeting be approved at a subsequent special meeting of the same body unless such approval were one of the specified purposes of that special meeting. Any unapproved minutes of a body may, however, be approved at a regular meeting of that body without special notification.

The minutes of a stockholders' meeting will probably not be passed upon until the following annual meeting, when they will be read, and, if no objections

are offered, approved. If approved, no record need be made save the statement in the minutes of the last held meeting that the minutes of the previous meeting were read and approved. Sometimes, as a matter of convenience, the secretary will endorse at the bottom of the minutes, after approval, "Read and approved at the Annual Meeting, September 24th, 1909," or whatever the date may be.

If objection is made to the form or substance of minutes as read, the president might, if the points objected to were obviously incorrect, order them corrected. Should the error be more serious, the correction might be ordered by formal motion, or, in the absence of objection on the part of those present, might still be directed by the president or chairman. In such event, the minutes of the meeting then in session should show exactly what correction was directed and in what minutes. In the corrected minutes the required changes should appear in red ink, and a marginal reference should give the date of the meeting at which such correction was directed. A single red ink line might be drawn through any part ordered stricken out, and corrections may be interlined or be written on the margin, but no erasure should be made in any case, as the corrected minutes should show both the error and the correction. This then shows the entire occurrence; that the record was made in one way, and was, at a later date, ordered changed.

The secretary has no discretion in this matter, but

must correct his minutes in accordance with the instructions of the meeting even though he may feel sure that his original entry was the true one. The meeting has full authority to say what shall be put in the minutes and what shall be excluded and the secretary can not gainsay that authority.

It sometimes happens that a stockholder or member, opposing some proposed action, wishes his objections or protest recorded in the minutes. If his objections are pertinent and not too lengthy, this should usually be done; but the presiding officer, not the secretary, would decide the matter, and the secretary should be guided by the president's directions. The objecting member will sometimes file his objections or protests in writing, and in such case the document should be received and filed, and the fact that it was received and filed be noted in the minutes.

Also at times it is necessary for a board member to file his dissent from or protest against some improper or objectionable board action, in order to avoid liability for such action. In this case he has the right to demand the entry upon the minutes of his dissent or protest. The president will, however, decide whether such matters shall be entered or excluded, and the secretary must be governed by the president's decision. (See generally, Chapters xxv and xxvi.)

### § 89. Stock Certificate Book.

Any stockholder whose stock is paid for in full, or who has paid therefor the full price demanded by

the corporation, is entitled to a stock certificate, or certificates, in evidence of his holdings. (See §§ 34, 42, 43.) These certificates are usually printed, lithographed or engraved, and attached to individual stubs, are numbered consecutively from one up to the total number, and are bound together in a book which is designated the stock certificate book. When a new book becomes necessary the numbering is carried on beginning with the next number above the highest in the old book. A line of perforations between each certificate and its stub renders easy the detachment of the certificate when issued.

Fifty to one hundred of these certificates are usually deemed sufficient for a corporation in which transfers are not likely to be numerous. For the larger corporations or for those in which the stock is active, the certificates are provided in books of five hundred to one thousand certificates and sometimes many volumes are required.

If the corporation issues preferred stock, the certificates of this stock are usually bound separate from the common stock certificates, though in the smaller corporations to avoid expense and the multiplication of books both kinds of stock are sometimes bound together in one book. Preferred stock certificates are also numbered independently of the common stock certificates. The preferred stock certificates should always be marked in some way to clearly distinguish them from the common stock certificates, and the preferences enjoyed by this stock and the condi-

tions of its issue, unless too lengthy, should appear upon the face of the certificates. Usually the preferred certificates are distinguished by having the word "Preferred" printed or tinted in on the face of the certificate, though there is no invariable rule as to the distinguishing marks. (See Forms 4, 5.)

When certificates are surrendered for reissue or for other reasons, they are cancelled—either by punching, or with a cancelling stamp—and the cancelled certificate is then pasted to the stub from which it was originally detached. The proper entries are then made on the stub, and the certificate and its stub present a complete record of the issue and return of the certificate in question.

The certificate book is kept by the secretary and remains in his custody.

#### § 90. Transfer Book.

The transfer book is composed of a series of blank transfers. (See Forms 61, 62.) These transfers are intended to be filled out when stock is to be transferred, and, when signed by the owner of the stock or his duly authorized attorney, become the secretary's authority for the issue of new certificates of stock in place of the old certificates surrendered.

In some few states the transfer book is required by statute. By reference to the assignment on the back of a stock certificate (Form 6) it will, however, be seen that the transfer book merely duplicates the assignment of the certificate. For this reason the



transfer book is not essential, and, where not required by statute, is frequently omitted by the smaller corporations. In such case the secretary depends upon the duly assigned stock certificate for his authorization to make desired transfers. The method from the legal standpoint is sufficient.

It is customary among the larger corporations to appoint transfer agents who assume the entire supervision of the issue and transfer of stock. These transfer agents are usually trust companies or other responsible institutions and by their appointment both accuracy and responsibility are secured.

In New Jersey and some other states, the transfer book is the final authority as to the voting rights of stockholders. In most of the states the stock ledger controls. (See § 91.)

#### § 91. Stock Ledger.

The stock ledger or stock book contains the name and address of each stockholder of record, the number of shares received and the number, if any, transferred by him, the date of such receipts and transfers and the number of shares remaining at any time in his name. (See § 46; also Form 60.)

When stock is received, the holder is credited in the stock ledger with the number of shares so required, and when he transfers part or all, he is debited with the number of shares transferred. The balance, if any, will always be on the credit side and will show the number of shares upon which the stockholder is entitled to vote and draw dividends.

The statutes usually require that a stock ledger be kept and that it be always open during business hours to the inspection of any stockholder of record or judgment creditor.

In New York the statutes require a "stock book" to be kept. This stock book is merely a stock ledger with some additional data as to the stock and its owners.

The stock book or stock ledger is usually regarded as the most important of the stock records, and usually controls; *i. e.*, in event the right of a stockholder to vote or to draw dividends is to be determined, the matter is settled by reference to the stock ledger. If his name appears there, he is a "stockholder of record," entitled to vote and draw dividends upon the shares of stock standing to his credit.

In some few states, however—notably New Jersey—by special statutory provision the transfer book controls, and in case a stockholder's right to vote is questioned, the matter must be decided by reference to this book.

## CHAPTER X.

### DIVIDENDS AND FINANCES.

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#### § 92. Dividends.

The matter of declaring dividends rests in the discretion of the board of directors. They decide when a dividend is to be declared and how much it shall be.

Dividends may be legally declared only from surplus or net profits. If paid from the capital or obtained in any way that will impair the capital of the company they are illegal. The directors render themselves personally liable for declaring such dividends and should the corporation become insolvent the amounts so paid to stockholders may be recovered from these stockholders for the benefit of creditors.

Dividends must be equal as between holders of the same class of stock. Particular stockholders may not be favored either in time or amount of payment. Dividends are paid only to stockholders of record. (§§ 47, 91.) If stock has been sold and the purchaser has neglected to have the transfer made on the books of the company, any dividends, unless the treasurer is duly and formally notified of the transfer, are paid to the former owner and the purchaser who is the

equitable owner of the stock, must look to him for satisfaction. Dividends can not be refused a stockholder of record because of the absence or loss of his certificate. (See §§ 42, 45.)

### § 93. Working Capital.

Usually when a corporation is organized some part of the capital stock is sold to provide working capital. Or when stock is issued for property, frequently a portion of this stock will be returned to the treasury as a donation, to be sold for this purpose. Or working capital may be included in the property turned over to the corporation.

To provide for later necessities the by-laws sometimes specify that a certain proportion of the profits shall be set aside for working capital before any dividends are paid, or shall be so set aside until a certain amount has been reserved. In the case of New Jersey corporations some such by-law is necessary if working capital and reserves are to be accumulated, as otherwise under the statutes all profits must be paid out as dividends. In most of the states the directors may use their discretion, reserving only such amount as they deem necessary for working capital, and, before or after doing so, paying such dividends from profits as they think best.

### § 94. Debt.

Certain restrictions upon the power of the board to incur debt are sometimes inserted in the by-laws.

The usual form this takes is a requirement that no indebtedness beyond a limited amount for current expenses may be incurred unless authorized by a two-thirds vote of the entire board, or, on occasion, an authorization from the stockholders will be required. (See §§ 115, 139.) The assenting vote of a specified proportion of the stockholders should always be required before the board may mortgage the corporate property. In many states this is provided by statute. The usual method of corporate borrowing is by the issue of bonds secured by mortgage upon the real, and sometimes upon the personal property of the corporation.

#### § 95. Bank Deposits.

The moneys of a corporation should be deposited in the name of the corporation in some bank or trust company designated by the board of directors. (See Form 52.) Such deposit should be in the name of the company and moneys deposited therein should be drawn out only by checks, signed by the treasurer and countersigned by the president or by such other officers as may be properly authorized thereto. (See Form 55.) The by-laws usually direct such disposition to be made, the board at its first meeting selecting the bank.

## CHAPTER XI.

### SUNDRY DETAILS.

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#### § 96. Corporate Offices.

A corporation is usually required to maintain a so-called "principal office" in the state in which it is incorporated. It may have other offices either within or without the state and these offices may be and frequently are larger and more important than the designated principal office, but this latter is still, from the legal standpoint, the principal office and the headquarters of the corporation. Certain of the corporate records are kept in the principal office and usually an agent must be kept in charge upon whom legal service, as against the corporation, may be made.

The principal office is the usual and most suitable place in which to hold meetings of the stockholders, and in some states the statutes provide that such meetings must be held in this office. The directors have much more latitude than the stockholders as to their place, or places of meeting, but, in the absence of good reasons to the contrary, should also meet in the principal office. The by-laws usually provide that all reg-

ular meetings both of stockholders and directors shall be held in the principal office.

### § 97. Corporate Seal.

The corporate seal is either provided for in the by-laws and is therefore adopted with the by-laws, or, otherwise, is adopted by direct resolution of the board of directors. No particular form of seal is required by the statute law, but, as a matter of practice, it should bear the name of the company, the state of incorporation and the year in which the incorporation was effected.

The corporate seal must be used in the execution of corporate deeds, mortgages and all other instruments of such nature as to require a seal when executed by an individual. It is also employed to authenticate certificates of stock, transcripts of motions or resolutions, and such other corporate instruments as may require formal authentication. An ordinary corporate contract, or promissory note does not require the seal, nor is it usual to affix it to the corporate checks. Its use on such instruments does not affect them in any way.

The secretary is usually the custodian of the seal and it is his duty to affix it to resolutions or other corporate documents when necessary, or when directed so to do by the board of directors, and, generally, when required in the course of his regular duties. (See Forms 48 and 58 for use of seal.)

The board of directors may, in its discretion, au-

thorize any officer of the company to affix the corporate seal.

### § 98. Execution of Contracts.

Corporate contracts are authorized by resolution of the board of directors and it is the general rule that an officer of a corporation must be so authorized before he can legally contract for the corporation. In practice, however, this rule is somewhat relaxed. The officers customarily make contracts in minor matters incident to their official duties without express authorization. Also in more important matters, if the officers have been habitually permitted to contract for the corporation without specific authorization, such contracts unless obviously in excess of the proper official powers, are binding on the corporation. If, however, the officers have been allowed to so contract only in particular directions, their contracts, while binding in these directions, are not binding as to other matters unless authorized by the board.

For instance, if the corporation has habitually allowed its president without express authorization to make contracts for machinery and lumber and material used in the corporate operations, such contracts though not specifically authorized are binding on the corporation. If, however, he should go further and contract to purchase real estate, or other property outside the usual routine, such contracts, unsupported, are not binding on the corporation. The board might repudiate any such contract absolutely, or ratify it



either by express resolution or by accepting the benefit of the transaction.

When an important contract is authorized by resolution of the board, the resolution usually empowers one or more of the corporate officials to execute the contract for the corporation. In such case, a certified transcript of the resolution, signed by the secretary and sealed with the corporate seal is the proper evidence of the officials' authority in the matter, and, if the contract were one offered to the corporation, sufficient evidence of its acceptance by the corporation. (See Forms 52-54.)

The deed, mortgage or other instrument involved in any such contract should close with a testimonium (See Forms 48, 58) reciting the authorization under which the officials are acting, and should be signed by them with the corporate signature and be sealed with the corporate seal.

## PART III.—CORPORATE ORGANIZATION.

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### CHAPTER XII. INCORPORATION.

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#### § 99. Subscription Lists.

Formerly when the organization of a corporation was contemplated, subscription lists were almost invariably circulated as a preliminary. Then if sufficient subscriptions to the stock were secured, application was made for a charter and the corporation was organized.

This plan is still pursued but not so commonly. Corporations are in most cases organized to take over particular properties or businesses and the subscription list is not brought into play. In such cases the only preliminary subscriptions are the formal subscriptions of the incorporators who sign the application for the charter.

When the subscription list is employed its form varies with the circumstances. Subscriptions under it are held to be continuing agreements by the subscribers to take the number of shares specified, and,

unless otherwise stated, at par and for cash. Usually the terms of payment are set forth in the instrument. All the conditions of subscription should appear on the list and any material change of these will release the subscriber. It is also customary and safe to have all the essential features of the proposed incorporation appear upon the subscription list. Then there can be no question on either side as to the terms under which subscriptions were made.

Under the usual form, subscriptions may be canceled at any time before the organization of the corporation. To render them binding from the time they are made, agreements with trustees and other special forms of subscription lists are sometimes employed. (See generally § 41; also Forms 1, 2, 3.)

### § 100. Application for Incorporation.

In former days application was made to the state legislature when a charter was desired. The grant was then a special charter to specified persons, authorizing them to conduct some particular enterprise under the corporate form. Usually these charters conferred some franchise or special privilege, as the right to erect a toll bridge, establish a bank, construct a railroad or build a dam.

The abuses arising from this method of granting charters have resulted in the prohibition of special charters in most states. Instead, general laws have been provided under which corporations for any legitimate purposes may be formed by any qualified

persons upon compliance with prescribed formalities. In some few states special charters are still granted on occasion, though the majority of their corporations are formed under general laws. (See § 18.)

The form of application for a charter under these general laws is usually merely a copy of the charter desired, or, in other words, the charter application when allowed becomes itself the charter. The charter application sets forth the names of the applicants and the name, purposes and other required details of the projected corporation. It is executed by the incorporators, and, after its allowance by the Secretary of State, is filed in his office. It must also usually be filed in the office of the clerk of the county in which the corporation is domiciled or has its home. If the proposed corporation is for proper purposes, if all fees have been paid, and the application is in due form, it is accepted and filed as a matter of course, and the parties are then authorized to proceed with the organization of the corporation. (See § 117.)

The details usually required in an application for a charter are discussed in the sections which follow. (For Charter Forms see Chap. XIX.) In most of the states the requirements are much more severe when charters are to be taken out for financial and public service corporations.

#### § 101. (a) Incorporators.

The parties applying for a charter must be competent persons of full age, and, ordinarily, some pro-

portion of them must be citizens of the state in which the application for charter is filed. Minors, firms or corporations, and, generally, persons not able to contract, are not competent parties, though they may usually hold stock after the corporation is formed. The minimum number of applicants is in most states three, though in some few states five are required. Each incorporator must ordinarily subscribe for one or more shares of stock and all must sign and acknowledge the application.

As a matter of convenience incorporations are usually effected with the smallest number of incorporators permissible, other interested parties coming in after organization. "Dummy" incorporators, or incorporators without any special interest in the matter, are frequently employed both as a matter of convenience, and, at times, to conceal the identity of the real parties in interest. (See §§ 123, 147.)

#### § 102. (b) Name of Corporation.

Wide latitude is usually allowed in the selection of the corporate name. The principal restriction is the prohibition of names like, or nearly like those of corporations already rightfully doing business in the particular state. In some states all corporate names must begin with "The" and end with "Company." In others the name must be followed by "Limited" or "Incorporated." In many states firms may become incorporated under the partnership name without change or addition of any kind. (See § 143.)

In most states companies organized for ordinary business purposes are not allowed to use the words "guarantee," "trust," "bank," "insurance" and the like in the corporate designation.

For practical reasons corporate names should be distinctive and not too long.

### § 103. (c) Purposes.

The purposes for which a corporation is to be formed must be set forth in the application and must be such as are permitted by the laws of the particular state. Ordinary business corporations are allowed much latitude in stating their purposes and are not usually confined to one business or line of activity. In some of the leading corporation states the only important restriction is the prohibition against extending the charter purposes to banking, insurance, transportation and those similar enterprises which are only allowed to corporations organized under special laws and with special formalities. Outside of these any number of purposes and diverse businesses may be included in one application. Since a corporation has no legal right to do any business not permitted by its charter, care should be taken to make the purposes sufficiently comprehensive to meet all proper corporate needs. (See § 19.)

The insertion of illegal purposes, or of purposes not permissible under the statutes, is ground for the rejection of a charter application. Even if such an application were inadvertently or wrongfully accepted

and filed by the state officials, it would be void as to these illegal provisions.

§ 104. (d) Capitalization.

The capital stock of the proposed corporation must be specified in the application and may be changed thereafter only by amendment of the charter. In most of the states there is no maximum limit to capitalization, though a minimum amount is usual; thus in New York there is a requirement that it shall not be less than five hundred dollars, and in New Jersey that it shall not be less than two thousand dollars. In many states there is no limitation of capitalization in either direction. (See § 34.)

§ 105. (e) Shares.

In most states of the Union the par value of shares of stock may be fixed by the incorporators at discretion. General restrictions are found in some few states, as in New York where the par value of the share must not be less than five dollars nor more than one hundred dollars.

One hundred dollars is the most convenient and most generally adopted par value for shares of stock. Mining companies, however, frequently issue shares as low in value as one dollar, and shares of the par value of ten dollars are not uncommon. The small share is convenient when small investments are to be invited, or when an impressive offering of shares for a small amount of money is a desideratum. (See § 34.)

## § 106. (f) Location.

A corporation must have a principal office in the state in which it is incorporated, and the location of this office must usually be specified in the application for its charter. It is customary to specify in the application that the company is to have the right to maintain other offices and to do business elsewhere either within or without the state. Unless expressly prohibited by the laws the corporation would, however, have this right without specification in the charter. (See § 96.)

In the state of its incorporation the company is a "domestic" corporation. Elsewhere it is a "foreign" corporation. In its own state it has certain legal rights as an incident of incorporation. In other states it has no such rights except as a matter of courtesy or as they may be granted it by the legislation of such other states. This is so because as an artificial person it does not come under the protection of those constitutional provisions which guarantee to the citizens of one state "all privileges and immunities of citizens in the several states." It may therefore be absolutely prohibited from doing business in another state, save in so far as it may be engaged in interstate commerce, with which state law can not interfere.

## § 107. (g) Duration.

In some states the duration of corporations is limited to some fixed maximum as twenty, thirty or fifty



years. In most states, however, while a corporation may be limited to any term specified by its charter, it is permissible to express its duration as perpetual. At the expiration of the term fixed by the law, or specified by its charter, the corporation terminates and then, unless its charter be extended, must be wound up. If this were not done the stockholders might be held liable as partners in any transactions subsequent to the expiration of the corporation's allotted period. (See §§ 14, 25.)

§ 108. (h) Number of Directors.

The number of directors of the corporation must in most states be specified in the charter application. The minimum allowed by law is usually three. It is but seldom that a maximum number is specified. In many states the number of directors may be fixed or altered by the by-laws.

A large board of directors is apt to be cumbersome, difficult to assemble and ineffective. For this reason a small board is preferable where the conditions will permit. Where a large board is unavoidable it usually necessitates the formation of an executive committee which manages the affairs of the corporation, and, practically, takes the place of the board. (See §§ 61, 73.)

§ 109. (i) Directors for the First Year.

Under the laws of many of the states the directors for the first year must be designated by the charter. The plan is a convenient one. In the greater number

of the states, however, the first board of directors is elected by the stockholders at their first meeting. It is a common requirement that one or more members of the board of directors must be citizens of the state of incorporation. (See § 123.)

**§ 110. (j) Charter Subscriptions.**

In a majority of the states the incorporators of a corporation must be subscribers for one or more shares of the company's stock. The names of these subscribers, their post-office addresses and the number of shares subscribed for by each must be specified in the charter application. (See § 41.)

**§ 111. (k) Classification of Stock.**

Under the laws of most of the states, stock may be classified in various ways. The most common classification is into common and preferred stock. (See Chap. v.) Another common classification is that of voting and non-voting stock. Sometimes stock is classified so that each class of stock elects one or more directors. (§§ 137, 145.)

**§ 112. (l) Cumulative Voting.**

The cumulative system is a modification of the ordinary system of voting designed to secure a more equitable composition of the board of directors than is otherwise usually possible. It is employed only in the election of directors. Under its operations the holders of minority stock who are ordinarily left absolutely without representation among the directors,

may, if their holdings are at all material, unfailingly elect one or more directors and thereby secure due representation on the board.

In some states cumulative voting is prescribed by statute and must be permitted by all corporations organized under the laws of those states. It may be obtained by proper charter or by-law provisions in almost all the states.

A fuller discussion of cumulative voting will be found under "Protection of Minority," in Chapter xv of the present volume. (§ 135.)

#### § 113. (m) Holding Stock in Other Companies.

For one corporation to hold the stock of another is contrary to the general principles of corporation law, and is not allowable unless expressly allowed. In New Jersey and some other states, the right is granted by statute to all corporations organized under their laws. In some other states it may be secured by the insertion of special provisions in the charter application.

The original prohibition against the holding of corporate stock by corporations was intended to prevent the control of one corporation by another. In the present day this very end has on occasion been found desirable and the existing relaxation of the rule is for the express purpose of permitting corporations to secure control of other corporations by purchase of their stock. By this method many of the great industrial combinations of recent times have been formed.

**§ 114. (n) Powers of Directors.**

The general powers of the directors are secured to them mainly under the common law. In many of the states these powers can not be enlarged or extended by charter or by by-law provisions. In some states, however, as in New Jersey, they may be materially increased by suitable charter provisions. In this way the directors may be given power to make and amend by-laws and do other things not permitted under the general law.

In most of the states the powers of the directors may be restricted to a greater or less extent by charter or by-law provisions. Some of the more usual of these limitations are noted in the next section. (See Chap. VII for general powers of directors.)

**§ 115. (o) Limitations on Salaries and Indebtedness.**

Limitations on the powers of the directors, if not so restrictive as to interfere with their proper freedom of action, are in some cases of material advantage to the stockholders. Common limitations are regulations as to the amounts to be paid in salaries and as to the total indebtedness that the directors may incur on behalf of the corporation. Some flexibility is generally given to these regulations by a provision that the limits set may be exceeded with the consent of some specified majority of the stockholders, or perhaps of the directors.

For instance, the maximum salary to be paid any official may be fixed at \$2,500 per annum, or some

specified sum may be named as the limit of the corporate indebtedness, these bounds not to be exceeded unless the directors are authorized thereto by a two-thirds vote of the entire outstanding stock of the corporation. At times the same end will be attained by a by-law provision that some specified majority of the board, as two-thirds, three-fourths or even the entire board, must concur in any increase of salaries or indebtedness above the by-law limits.

Sometimes the salaries to be paid officers will be made dependent in a measure on the profits earned, or upon the dividends paid, and the power to incur debts or liabilities will be limited to some definite proportion of the assets of the company. (See § 139.)

#### § 116. Execution of Certificate.

The charter application having been duly made out in conformity with the laws of the state of incorporation, is signed—usually in duplicate—by the incorporators. It is then acknowledged before some officer authorized to take acknowledgments to deeds, and is ready for filing. (See Forms 8-10.)

#### § 117. Filing and Recording.

Under the usual procedure, the duly executed application, accompanied by the proper fees, is sent to the office of the Secretary of State while another copy is filed with the county clerk of the county in which the proposed corporation is to have its principal office. Each state has its own minor variations in procedure,

which will be found in its statute law. In New York the state fees must be sent to the State Treasurer. When these fees are received, the Treasurer certifies that fact to the Secretary of State and this latter official will not file the charter until this certification is received. In New Jersey the application is filed with the county clerk first, and a copy certified by him is then filed with the Secretary of State. In some states, the application must receive the approval of the judge of a specified court before it will be filed.

If the application for charter is in due shape and all fees are paid, it is accepted and filed as a matter of course. Having been drawn in the form of a charter, or certificate of incorporation, the application becomes, when filed, the charter of the corporation, the existence of the corporation dating from such filing. In some states, as soon as filed, a copy of the charter under the great seal of the Secretary of State is forthwith sent to the incorporators as a matter of course and is evidence of the due incorporation of their company. In other states, the incorporators are merely notified that their application is accepted and filed. Then if they desire copies of the charter, certified by the Secretary of State, they may secure them by the payment of certain additional fees. (See § 100.)

#### § 118. Fees and Expenses.

The different states regulate the fees for incorporation according to the varying views of their legislators, and there is for this reason wide differences

in the cost. In some states—more particularly in the western part of the country—one uniform state fee is charged for all incorporations, as in Washington where twenty-five dollars is the fixed filing fee regardless of the amount of capitalization. In most of the states, however, the fees vary with the capitalization and are usually a certain small percentage upon the total amount of the capital stock. In all the states there are sundry minor fees that are paid to different officials for their services. (See Form 11.)

In most of the states after incorporation special annual franchise taxes are imposed. These taxes are in addition to the taxes levied on property, which are the same for a corporation as for an individual. They are in some states a fixed amount imposed without regard to capital stock, but usually vary with the capitalization. Exemptions are often granted to manufacturing corporations employing all or the greater portion of their capital within the state limits. (See Form 12.)

### § 119. Books, Stock Certificates and Seal.

It is desirable that a corporation shall keep a stock ledger. For the larger corporations a transfer book will be found necessary. In some states these books are required by statute. The stock ledger is a record showing who are stockholders, when they became stockholders and how much stock they hold. The transfer book consists of blank transfers which are filled out and executed when stock is transferred

from one person to another. Sometimes the transfer book will be omitted, the secretary relying upon the assignment upon the back of the stock certificate for his authority to make transfers. (See §§ 46, 87, 90, 91.)

The stock certificate book consists of certificates of stock partially printed and numbered from one up, each attached to its respective stub and with blanks left to be filled in at the time of issue with the name of the owner, number of shares owned, date of issue and signatures. (See §§ 42, 43, 89.)

A seal is also a necessary feature of the corporate equipment. (See § 97.) Likewise a minute book. (See § 88.) A neat and serviceable outfit consisting of stock books, minute book, stock certificates and seal may be had for ten dollars. Cheaper outfits may be obtained, but are not advisable. From these minimum figures the cost of an outfit ranges far upward, depending upon the style and binding of the books and the character of the certificates.



## CHAPTER XIII.

### FIRST MEETING OF STOCKHOLDERS.

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#### § 120. Preliminary.

In the great majority of the states the allowance of the charter must precede the organization of a corporation. In a few states under the statute requirements this procedure is reversed, the incorporators meeting and arranging the organization of the corporation before its charter application is even filed.

When a corporation is created by the allowance of its charter, it already has the statute law and the provisions of its charter for its guidance, but it has usually neither directors, officials nor by-laws. All these must be provided before the corporate operations may properly begin. The adoption of by-laws and election of directors and officers are the essential features of the organization of the corporation, and are the first matters demanding the attention of its stockholders.

Under the usual procedure as soon as the charter is allowed the stockholders meet, adopt by-laws and elect directors. These directors meet as the next

step and complete the corporate organization by the election of officers. The corporation is then equipped for the proper exercise of its corporate functions.

In a few states the directors for the first year are named in and appointed by the charter. When these directors are empowered to adopt by-laws, they can complete the organization of the company without action of the stockholders. In such case the first meeting of stockholders loses much of its importance and is sometimes omitted. When held the election of directors is passed over, but by-laws are adopted and such other action taken as may be necessary.

The first meeting of the stockholders is simply a special meeting, its particular purpose being the organization of the corporation. (See § 53.) As a special meeting it must be called with all due formality. The simplest and most convenient plan for its assembling and the one usually employed, is for all the incorporators to join in a call and waiver. (See Form 17.) This designates such convenient time and place for the meeting as may be agreed upon, states its purposes, and expressly waives any further requirements as to notice. The call and waiver is always allowable as a means of assembling a meeting. If, however, for any reason it can not be used for the first meeting and no other method is prescribed by the statutes, a call might be issued by the majority of the incorporators and be duly served by advertisement or by personal service upon those entitled to attend this first meeting.

In most states the incorporators are authorized by express statute provision to call and hold this first meeting of stockholders, though in the absence of such provision they still have this necessary authority. The incorporators may usually give proxies if they wish and it is not uncommon for a first meeting to be held without a single member of the company being present in person. Those who are in attendance act and conduct the meeting solely by virtue of the proxies given them by the absent incorporators. (See § 57; also Form 16.)

The first meeting of stockholders is usually purely formal. The organization of the company and any important action is agreed upon in advance, and minutes are prepared in accordance. At the meeting the minutes are followed to the letter. To such an extent is this practice carried at times, that the attorney in charge merely reads his prepared minutes to the assembled incorporators and no other action of any kind is taken. If such a meeting is properly called, if a majority of the incorporators are present, and if no objections are offered, the minutes as read are held to be a record of the proceedings of such meeting and can not be later set aside.

Usually, however, the first meeting is less perfunctory, and, while the minutes may be prepared in advance, they are used merely as a memorandum of the necessary proceedings, the actions of the meeting being carried through in due form. This is the better practice and is the procedure outlined in the present chapter. (See Forms 22, 23.)

### § 121. Opening the Meeting.

Pursuant to the call and waiver, or such other due notice as may have been given, the incorporators assemble at the appointed time and place and choose a temporary chairman. With the consent of the meeting the chairman appoints a temporary secretary, or the meeting may choose this official.

The chairman then asks for the call and waiver, or such other call or notice as has been used to assemble the meeting, and, in the absence of objection, usually orders this entered on the minutes. The same end may be attained by formal motion if preferred. The names of those present should be recorded in the minutes, and the fact that all or a majority of the incorporators were present should be stated. If any are present by proxy that fact should also be noted.

The charter is then presented to the meeting with a statement that it has been allowed—the date of allowance being given—and that all statutory requirements have been fulfilled. The instrument is usually ordered spread on the first pages of the minute book. (See § 88.)

### § 122. Adoption of By-Laws.

The next step is the adoption of by-laws. The preparation and full consideration of these by-laws is too formidable an undertaking to be left until the time of the meeting. Usually, therefore, they are drafted by the attorney in charge and are fully considered by the incorporators and any other interested parties, prior to the meeting.

If the by-laws have been prepared with careful consideration and have been fully agreed upon in advance and all are familiar with their provisions, they will frequently be presented to the meeting as a whole, and be adopted as presented. The usual and the safer plan is, however, to have them read, article by article, each article being adopted as read; then at the conclusion a motion is made adopting them as a whole and directing that they be entered on the minutes immediately succeeding the certificate of incorporation. (See §§ 31, 88; also Forms 13, 14.)

These by-laws are the working rules of the company. They become effective as soon as adopted and the next proceedings of the meeting are conducted in accordance with their provisions.

### § 123. Election of Directors.

As has been said, in some few states the directors are named in the certificate of incorporation and the election of directors at the first meeting of stockholders is, then, necessarily, omitted. In the other states it is one of the most important features of the stockholders' first meeting. It usually follows the adoption of the by-laws. Tellers or inspectors of election should be appointed and the election be by ballot. (See Forms 69, 69a.) Nominations may be made, or the matter may be left open, each incorporator voting for such qualified persons up to the number of directors to be elected as he sees fit. The

number of votes each casts will be determined by the amount of his stock subscription, usually one vote for each share subscribed. Care should be taken that those elected be legally qualified to act. In the greater number of states it is required that each director shall own one or more shares of stock; also that one or more of the directors shall be citizens of the state of incorporation.

Where stock requirements exist and persons whom it is desired to have upon the board are not stockholders, it is a common practice to place one or more qualifying shares of stock in their respective names. This results in the so-called "dummy directors"—that is, directors who have no material interest in the corporation, but who are elected to hold the place temporarily or to represent or act in the interests of others. If sufficient stock has been given these dummy directors to make them eligible and the laws of the state are complied with in the details of election, they have the same rights and powers in the management of the corporation that any other directors would have.

Usually it is either known or ascertained before the election that the persons voted for will accept the position of director if elected. Awkward contingencies occasionally arise from the refusal of directors-elect to accept the position to which they have been elected. It is better to forestall such possible difficulties by determining the matter as far as may be in advance. (See Chap. VII; also Forms 67, 68.)

### § 124. Proposal to Exchange Property for Stock.

Most modern corporations are organized to take over an existing business, or some special property, all or part of the stock of the corporation being issued in payment therefor. In such case it is an important part of the proceedings of the first meeting of stockholders to approve the purchase of the property to be acquired and to authorize the issue of so much of the company's stock as may be necessary in connection therewith.

The simplest method of arranging the whole matter is for the owners to make a written proposal to the corporation, offering the business or other property in exchange for all or a part of its stock. This proposal is brought up in the stockholders' meeting and read in full. After this reading it may be ordered spread upon the minutes, but, as the proposal is presented to the first meeting of directors a little later, and it is not necessary that it should appear in full upon the minutes of both meetings, it is usually, and better, left for entry in the minutes of the directors' meeting. In such case the proposal is merely read and the meeting then passes on to its consideration. (See Forms 19, 22.)

### § 125. Resolution Approving Exchange.

If the proposal for exchange of stock for property is acceptable as presented, a resolution is adopted approving the proposed exchange and specifically authorizing and directing the board to take such action as

may be necessary for its consummation. (See Form 20.)

The preamble of this authorizing resolution usually recites or refers to the main features of the proposal, agrees to its acceptance with the direct statement that the property to be so acquired is necessary for the purposes of the company, endorses the valuation placed upon this property and concludes with specific instructions to the directors to accept the proposal and to do all such things as are necessary to make their acceptance effective.

The adoption of this resolution effectually commits the stockholders to the purchase of the property, to the valuation placed upon it and to the issuance of the specified stock in exchange therefor. They and their assignees are thereby debarred from any later objection.

In most cases the directors have power to accept a proposal of this kind for the exchange of stock for property without direct authorization from the stockholders. The matter is, however, so important that it is usually deemed best to have the assent of all interested parties.

#### § 126. Other Business.

The adoption of by-laws, election of directors and authorization of these latter to any specially important action, completes the usual business of the stockholders' first meeting. Other matters may be brought up for the stockholders' consideration, but it is seldom that any further action of moment is taken.



It is to be noted that the wishes of the stockholders as to the future conduct of the company or its business should be embodied in the by-laws. Under the conditions which usually obtain, resolutions instructing or restricting the directors are of no legal effect. Embodied in the by-laws the same directions would, if proper in themselves, be binding upon and control the board of directors.

With the completion of the business brought before the first meeting, the stockholders usually adjourn *sine die*, not to again assemble until the regular annual meeting, or until sooner called together in special meeting. If, however, the business before the meeting is not completed, or other matters are coming up shortly which will require the action of the stockholders, the first meeting may be adjourned until some fixed future date. It will then reassemble at the appointed time without formality and resume its session. It is merely a continuation of the original meeting and as such does not require any further call or notice to the stockholders. (See Form 22.)

## CHAPTER XIV.

### FIRST MEETING OF DIRECTORS.

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#### § 127. Preliminary.

As the by-laws are usually adopted prior to the election of the directors, these latter when elected will have the by-laws for their guidance. Their first meeting is merely a called meeting for special purposes,—*i. e.*, the election of officers and such other action as may be necessary in this early stage of the company's affairs. It may therefore very properly be assembled under the by-law provisions for special meetings of the board. Usually, however, and most simply, it is convened, as in the case of the stockholders' first meeting, by all entitled to be present joining in a call and waiver of notice. (See Form 18.) When all are agreed as to the matters to be transacted at this first meeting the minutes may with propriety be written out in advance. They will then serve as a program of the meeting and may usually be followed to the letter.

#### § 128. Opening the Meeting.

When the directors assemble at the appointed time

and place for their first meeting, they have as yet no officers. They will, therefore, choose a presiding officer pro tem and he will appoint, or the meeting will choose a temporary secretary. A director can not be represented by proxy at a board meeting (See § 66) and the secretary will therefore only note the number and names of those in actual personal attendance. If a quorum is shown to be present the chairman will then ask for the call and waiver, or other call or notice by which the meeting was assembled, and will direct, or motion will be made, that it be entered in the minutes, or that record be made of its due execution and service, or publication as the case may be. The meeting is then ready to proceed to the next order of business. This is usually the election of officers.

#### § 129. Election of Officers.

The by-laws should contain full provisions as to the officers to be elected and the method of choosing them. Usually the election is by ballot, though if all present agree to waive this requirement any other suitable method is permissible. Where there is but one candidate for an office the secretary will frequently be instructed to cast the single ballot of the meeting for the person named. Two positions, if their duties are not incompatible, may be conferred upon one person. The offices of secretary and treasurer are often filled by one individual, but it would always be awkward and in some states legally impossible for one person to be both president and secre-

tary. The salaries of officers are usually arranged at or before the time of election. If they are to receive no compensation it should be so stated in the by-laws, or by means of a resolution, or be put upon record in some other way to avoid any subsequent misunderstandings.

As soon as the result of the election of officers has been announced, the newly-elected president and secretary, if present, will usually take charge of the meeting. If they are absent, or if other causes prevent the immediate assumption of their official duties, the temporary officers will continue to act until the close of the meeting, unless sooner relieved by the permanent officers.

### § 130. Exchange of Property for Stock.

The consideration of the proposal for exchange of property for stock usually follows the election of officers. The proposal submitted and read to the first meeting of stockholders and the stockholders' resolution authorizing its acceptance (Forms 19 and 20) should be presented to the meeting and read in full. Unless already recorded in the minutes of the stockholders' meeting the proposal should be ordered spread upon the minutes. (See Form 22.) Then a resolution accepting the proposed exchange and directing the officers of the company to receive the transfers of the property and to issue the necessary stock in exchange therefor is adopted. (See Form 21.) This places the matter in the hands of the officers of the company with full power for its consummation

and no further action on the part of the board is usually necessary.

### § 131. Designation of Bank.

The election of officers and the acceptance of the proposal for exchange of property for stock are usually the most important matters coming before the first meeting of the directors. Its further action is mainly directed to such details as are necessary for the proper operation of the corporate business. Those relating to the corporate finances are among the more important of these.

It is most desirable that the financial operations of the new corporation should be begun and be conducted in a business-like manner. All moneys coming in should be promptly deposited in a designated bank in the name of the company. No money should be withdrawn save as authorized by the directors, and the actual withdrawal should be only by check, duly signed and countersigned by the proper officials.

The by-laws adopted by the stockholders at their first meeting usually provide in detail for the deposit and withdrawal of the company's funds, but leave the selection of the depository to the directors. Accordingly a formal resolution is adopted at this first meeting of directors, designating the bank or banks in which the funds of the company are to be kept and providing any other necessary details as to the handling and management of the corporate moneys.

A copy of this resolution, duly certified by the secretary, should be prepared and be filed with the se-

lected bank at the time the account is opened. (See Form 52.) If the directors' resolution does not embody the provisions of the by-laws relating to bank deposits, a certified copy of the by-laws, or of the particular by-law or by-laws in point, should also be prepared and filed with the resolution. (See Form 15.)

Usually provision will have been made in advance to supply the new company with funds, by stock subscriptions already secured, by sales of stock or through other means. Whatever the plan the board will take action at this time to make the arrangements effective.

#### § 132. Other Business.

Sundry other matters will properly come before the first meeting of the board. Arrangements must be made for office accommodation. Specific authority must be given the officers if anything is to be done outside the usual routine of the corporate business. The expenses of incorporation, including the fees to the state, and the legal and incidental obligations incurred by those having charge of the matter, should be approved and ordered paid. A form of stock certificate should be chosen, or, if already selected, approved. The secretary should be directed to procure the books and stationery necessary for his work. Any other requisite supplies and equipment should be authorized. The bond of the treasurer, if this is required and is presented in acceptable form, should be approved. In some states inspectors for the next

annual election of directors must be chosen. If reports must be made or if there are other statutory requirements to be complied with, either in the state of domicile or in the state where the corporation expects to do business, proper provision should be made. In short all those matters should be attended to that are necessary to begin or facilitate the operations of the company.

### § 133. Adjournment.

It frequently happens that business under consideration at the first meeting of the board can not be completed at its session, or that other matters requiring board action are likely to come up before the next regular meeting. In such case to save the trouble and formality of calling a special meeting for the consideration of these matters, the meeting is adjourned till the next day, or the next week, or other convenient designated time. Then, as a continuation of the original meeting, it reassembles without formality and resumes its work. If desirable it may again adjourn to meet at some specified future date. Usually the only object of such continued adjournment is to save the formality and delay attendant upon the calling of special meetings.

If an adjourned meeting does not reassemble at the appointed time and place, it lapses and can not be revived. Then if a meeting be necessary before the date of the next regular meeting, it must be convened as a special meeting in accordance with the requirements of the by-laws.

## CHAPTER XV.

### PROTECTION OF MINORITY.

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#### § 134. General.

The rights of the smaller, or minority, stockholders of a corporation are somewhat scant. They are entitled to an honest and efficient administration of the corporate affairs. They are entitled to such publicity of management as will enable them to judge whether the corporate affairs are so administered. Also they are entitled to such knowledge of the actions and intentions of the majority as will give them time and opportunity to avert or avoid any threatened action injurious to their interests. This is practically the measure of the minority's rights. They may neither dictate nor interfere in the corporate management in any way, save for the direct protection of threatened interests.

While the rights of the minority are few, it is of vital importance that these few be properly protected. This is best provided for when the arrangements for incorporation are in progress. At that time all concerned are usually ready to accede to any fair and reasonable demands. If those who will be in the



minority are then in evidence and know how their interests may be protected, they may usually secure any proper concessions. If not provided for at this time efficient protection can hardly be secured later.

Unfortunately in many cases corporations are organized by those who expect to control and the rights of the minority receive small attention or are entirely ignored. In such event the only safe course for the minority is the sale of their stock. Better still, the unpleasant and usually unprofitable situation may be avoided entirely by a refusal to purchase stock in corporations which show so little regard for minority rights. If this latter course were more commonly pursued the rights of the minority would receive far more respectful attention than is now the case, and the status of the smaller stockholders would be much improved.

When, however, the prospective minority interests are in evidence and in a position to enforce their due rights at the time of incorporation, or when those in charge are willing to include proper protection of the minority in the general corporate scheme, the matter resolves itself into a choice of means. There are a number of methods employed for the protection of the minority. Most of these are founded upon representation upon the board of directors. Practice has shown that this is usually the most effective method possible.

The board is the managing body of the corporation. All active direction of the corporate affairs for

good or for bad emanates therefrom. If then the minority have one or more capable representatives in this body these representatives are in a position to know all that is done, or proposed to be done, and to be heard in regard thereto. Their mere presence will usually operate to prevent any flagrant invasion of minority rights. If, however, injurious action is threatened, the minority stockholders will be informed and may act with all necessary promptness in protection of their interests. Through their representatives on the board they will at all times have access to the corporate books and accounts, and, generally, are in a position to enforce their rights intelligently and effectively should the necessity arise. Experience has shown that the minority have small cause for apprehension if they have one or more able representatives on the board.

#### § 135. Cumulative Voting.

Cumulative voting is one of the simplest and most effective means whereby minority representation on the board may be secured. It is a modification of the usual plan of voting whereby the minority interests—if their holdings are at all material—may unfaillingly elect one or more board members.

Under the usual plan of voting, each share of stock has one vote for every director to be elected, but may only give one of these votes to a candidate. As a consequence the majority elect the entire board, and, unless by grace of those in control, the minority are

left absolutely without representation. Under the cumulative system each share of stock still has one vote for each director to be elected, but these votes may be cast all for one candidate or may be distributed among the candidates as the voter sees fit. In other words each stockholder has the right to cast as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and to cast this number of votes for one candidate or distribute them among a number of candidates at his discretion.

For instance, if five directors are to be elected, each share has one vote for each of these or five votes in all. Under the ordinary system but one of these votes can be cast for one person, and if the five votes are cast they must be divided among five candidates, one vote to each. Under the cumulative system the number of votes is the same, but they may be cast exactly as the voter pleases. The whole five may go to one candidate or be divided between two, or be scattered among them all in such way as the voter sees fit.

If then one hundred shares of stock participated in such an election, a total of five hundred votes would be cast. A minority controlling twenty shares and acting together would cast one hundred votes, and, if all these were cast for one candidate, he would infallibly be elected. The remaining eighty shares would cast four hundred votes, and, if acting together, would elect four directors, but they could not

by any possible combination prevent the minority from electing the fifth. If the majority divided their votes among four candidates, each would receive one hundred votes and all would be elected, together with the minority candidate who also receives one hundred votes. If they divided their votes among five or more candidates the total for each would fall below one hundred votes, and, while they would probably elect four of their candidates, the minority candidate would also be elected as before.

It is apparent that to secure the greatest advantage from cumulative voting those forming the minority must act together with intelligence and must so cast their votes as to secure the best possible results. If they do not, the whole benefit of the system may be lost to them. Thus in the preceding example if the minority divided their votes between two candidates, giving fifty shares to each, the majority might apportion their votes among five candidates, and giving eighty votes to each, elect the entire five and thereby exclude the minority from the board.

On the other hand it is also necessary for the majority to vote with discretion. If the minority are strong and well handled it is entirely possible for the majority by a careless scattering of their votes to actually lose their control of the board.

Cumulative voting is allowed in most states of the Union. In some it is prescribed by statute and must be employed in all corporate elections. The system is much esteemed where understood and its use is extending. (See §§ 56, 112.)

## § 136. Non-Voting Stock.

Stock deprived of its voting power may be used to advantage when the parties to an incorporation, though of varying interests, wish to preserve an equality of power in the management. The occasion frequently arises in the incorporation of a partnership when the partners with smaller investments become minority stockholders, and, under the usual arrangement, would be largely, if not entirely, excluded from the management of their own affairs.

In this case the same equality of management in the corporation that obtained in the partnership may be preserved only by equal representation on the board. Cumulative voting insures representation, but not equal representation and therefore does not in itself meet the requirements of the present case. The desired end may be attained by the use of non-voting stock. To accomplish this the company's stock is divided into two classes, one a voting stock, the other non-voting, the amount of each class depending on the particular conditions. The voting stock is then apportioned equally among the parties interested, while the non-voting stock is so distributed as to provide for the varying interests of the different participants. As a result all the parties are exactly equal in voting power and therefore if coupled with cumulative voting are equal in the management of the corporation. In any division of profits, however, as the non-voting stock participates in dividends just

as does the voting stock, the parties with the larger interests receive properly the larger returns.

This arrangement is very effective and may be modified in sundry ways to protect or give special rights to the minority. (See § 145.)

### § 137. Stock Classification.

In those states in which it is permitted, another method of providing equal, or special representation on the board of directors is found in the division of the corporate stock into voting classes or groups, usually unequal in size, but each possessing the power to elect one or more members of the board.

For instance, if a partnership with three members is to be incorporated, and, while the investments are different, the management is to be shared equally, a board of three directors might be provided. If so, the capital stock is then fixed at the total amount of the partnership assets and is divided into three classes or groups, the classes varying in amount so that each represents the interest of one of the partners in the business. Each class is by charter provision given power—irrespective of its amount—to elect one director. Each partner then receives the entire amount of the class of stock which represents his interest. When this is done each partner, while holding his proper interest in the corporation, and participating in profits accordingly, elects one director and has therefore equal power in the management. He may elect himself a director, or elect someone else to rep-

resent him. Further he may sell any amount of his stock short of the fifty-one per cent. required to control his class, and still retain his power to elect one director.

This system of classification is a very efficient means of minority protection. In those states where permitted, it is worked out in many forms. (See § 145.) It should, however, be carefully considered before it is employed, as the arrangement, once adopted, is difficult to change and occasionally leads to undesirable complications.

### § 138. Voting Trusts.

The voting trust is an arrangement or disposition of the majority of the voting stock of a corporation under which for a definite period its vote must be cast in its entirety for certain specified ends. Its usual purpose is to maintain the existing, or an agreed management for a term of years. So used it may serve as an efficient means for the protection of the minority.

In the early days of an incorporation all parties in interest are usually disposed to be fair. A management acceptable to both majority and minority may then be obtained. If the majority concur, this management may be fixed for a specified period by means of the voting trust, thus avoiding changes which might be injurious to minority interests.

To form a voting trust, sufficient stock to control must be actually placed in the hands of voting trus-

tees. This stock is held by them under the terms of a voting trust agreement which specifies how its vote must be cast, and this vote may then be cast only in accordance with these specifications. The operation of a properly drawn agreement is absolute. If it provides that at elections of directors the vote of this stock shall be cast for certain specified persons, those persons will be elected unfailingly and the membership of the board preserved unchanged during the life of the agreement. Provision is usually made for possible vacancies caused by the death, inability or refusal to serve of any of the designated directors. Also the trustees are usually given authority to vote the trust stock held by them, on any general matters coming before the stockholders for their action. The trustees usually issue trustees' certificates for the stock placed in their hands under the trust agreement, and they must account to the equitable owners of this stock for any dividends declared thereon during the continuance of the trust.

Voting trusts are allowable under the laws of most of the states. In New York and some other states their period is limited to five years. In most of the other states they would be upheld if the agreement was for a reasonable period.

### § 139. Limitations on Expenditures.

Limitations are sometimes inserted in the charter in the interests of the minority, providing that the salaries of officers shall be some certain amount, or



shall not exceed a specified sum save with the consent of two-thirds of the voting stock, or shall be limited to some moderate prescribed figure until dividends have been paid regularly at a certain per centum for one or more years. Or it is sometimes specified that no indebtedness beyond a given proportion of the appraised value of the assets shall be incurred without the consent of a specified majority of the stock.

Under some circumstances these restrictions and the sundry other variations of which they are capable are found to be materially advantageous. Such limitations should not, however, be so tightly drawn as to restrict the proper corporate action of the company or interfere with its successful business operation. (See § 115.)

#### § 140. Restrictions on Amendments.

Sometimes as a means of minority protection it is provided in the certificate of incorporation that a specified majority shall be required for the election of directors. At times the provision will be extended to also include amendment of the charter and by-laws. These majorities are placed high enough to require the participation of a material proportion of the minority interests and the requirement therefore acts directly for their protection. Then an acceptable board of directors having been once selected, no change of any kind can be made in the management thereafter without the assent of the prescribed majorities of the outstanding stock.

For example, the charter of the American Tobacco Company contained the following provision:

"It is hereby provided that it shall require a majority of seventy-five per cent. of the outstanding voting stock to amend the charter, to amend the by-laws, or to elect directors in this company."

It is a fair inference that when the American Tobacco Company was organized, a strong minority interest would enter only on condition that the provision quoted was incorporated in the charter of the company, and that this charter and the by-laws and the first board of directors, should be satisfactory to them.

When all this was accomplished there could be no change in the existing state of affairs without the consent of the minority interests, provided they controlled at least 26 per cent, of the voting stock. If a new board were proposed they might merely refrain from voting; there would then be no election and the old board would hold over. Neither could there be any change in charter or by-laws not approved by them. Under such conditions the minority were undoubtedly in a position to fully protect their interests. It should be noted, however, that the arrangement is allowable under the statutes in only a few states.

#### § 141. Restrictions on the Voting Power.

Under the English Companies Act, which controls in England, every stockholder has one vote for each

share of his stock up to ten. If he holds more than ten shares he has one vote for each five shares above that number up to one hundred shares. Above that number he has one vote for each ten shares he may hold.

As will be seen this has the effect of materially lessening the power of the larger stockholders. The arrangement, or any desired modification of it, might be had under the New Jersey law and probably in some other states of the Union, but the plan is not generally available. It is undoubtedly effective but would probably render an election of directors a complicated proceeding.

## CHAPTER XVI.

### FROM PARTNERSHIP TO CORPORATION.

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#### § 142. General.

The conversion of a partnership into a corporation under the usual plan is a comparatively simple matter, accomplished without interruption to the general business and without material change in its mode of operation. Almost any feature that characterized the partnership may be continued in the corporation. Even the name may usually remain unchanged. The legal relations and liabilities of the members of the organization are modified, but the general method of work and the personal relations and responsibilities of its members may for all practical purposes be left unaltered.

Generally a partnership should be incorporated in the state in which its principal operations are conducted—that is, the state in which the headquarters of the firm have been located. Occasionally conditions will exist that render incorporation in another state advisable. In such case the corporation will operate in what would naturally have been its home

state, as a foreign corporation. The advantages of such an arrangement should be obvious and material to justify its adoption. (See § 106.)

The capitalization of the incorporated partnership is usually determined by the amount of the firm assets. A fair valuation of the business is made, in which good-will may be properly included, and the capital stock, or capitalization, is fixed at the amount so determined. Occasionally the capitalization is placed at an amount much less than the real value of the assets in order to avoid taxation.

#### § 143. Name.

The partnership name should in itself represent a considerable trade value. To avoid its loss the partnership name on incorporation is usually retained in some form as the corporate name. In some states the firm name may be adopted without change of any kind. This practice is, however, open to objection as there is then nothing in the name to indicate that the concern is a corporation, and parties transacting business with it might, unless informed in advance of its corporate character, be able to hold the stockholders as partners.

Usually the firm name is retained with the addition of Company, the firm of "Wilson & Brown" becoming on incorporation the "Wilson & Brown Company," or perhaps the "Wilson-Brown Company." Another method of avoiding any possibility of liability is to add the word incorporated, as "Wilson

& Brown, Incorporated," this last word being abbreviated in written or printed matter to "Inc."

In most of the states the word "The" may be made part of the corporate name if desired. In a few states it is obligatory. Very awkward verbal constructions sometimes occur when it is employed. (See § 102.)

#### § 144. Usual Arrangements.

When a partnership is incorporated the obvious and customary arrangement is to fix the corporate capitalization at the value of the partnership business. The entire capital stock is then issued to the partners as full-paid stock in exchange for the business, which is thereupon transferred to the new corporation. This general method of arranging the matter is the simplest possible and, where the partners' interests are equal, is equitable and satisfactory. The partners may have the stock issued in the firm name, or to one of the partners as trustee, later allotting it among themselves in proportion to their respective interests in the old firm, or may have it issued direct in proper proportion to themselves.

Sometimes in order to provide working capital for the corporate business, the capital stock is placed at a figure in excess of the assets, the excess stock is sold and the proceeds turned into the treasury of the company. If the equality of voting power among the partners is to be preserved and this additional stock is a voting stock, it might either be purchased by the partners in agreed proportion, or each partner might be assigned his proportion to sell among his

friends. If it is sold to outsiders, this additional stock under such circumstances would usually be a non-voting stock—probably some form of preferred stock. (See §§ 39, 136.)

#### § 145. Special Adjustments.

Where the partnership interests are not equal, the apportionment of stock in the incorporated business in direct proportion to these interests without adjustment of any kind would sometimes work great injustice. For instance, one partner may have supplied the larger proportion of capital, but the other partner—if there be but two—may have contributed more time, or such skill, repute, business knowledge, or connection as to fully entitle him to an equal share in the business, or otherwise to such control, or proportion of the profits, or other advantageous arrangement as may have existed under the partnership agreement. In such case to give the greater financial interest absolute control by an allotment of a majority of the voting stock would be obviously inequitable.

Such a contingency may be easily provided for under the flexible conditions of incorporation. Equality of management may be preserved by the issuance to each partner of an equal amount of voting stock. The larger investment of the one may then be provided for by an issue to him of non-voting stock to the amount of his excess investment. This stock might participate fully in dividends, but usually would be a preferred stock drawing a fixed limited dividend.

Under such an arrangement both partners are on the same footing as far as the control of the corporation is concerned, and in all other corporate matters, except that before any division of profits is made the partner with the larger investment receives the agreed interest or return on his excess investment; also, if his extra stock be preferred, this usually gives him the right to receive back his excess investment in full in case of dissolution before the other partner receives anything. (See § 53.)

The same end might be attained by the issuance of bonds for the excess investment of any partner. Another plan is to divide the stock into as many classes as there are partners, each class representing in value the investment of the partner to whom it is allotted, but—without regard to this value—having the right to elect one director. If then the board of directors is the same in number as the partners of the incorporated firm, this secures an absolute equality of management regardless of the differing investments. (See §§ 111, 137.) The same end will sometimes be secured by the formation of a voting trust. (See § 138.) Special official salaries are also sometimes employed to adjust the varying interests of the incorporated partnership. In short there is no legitimate arrangement of the partnership which can not be transformed into some equivalent, or equally satisfactory corporate arrangement.

#### § 146. Preliminary Contract.

Any special features of the partnership interests



and relations that are to be retained in the new organization, should be embodied in a preliminary contract between the partners. Even if the usual arrangements are to prevail, a memorandum of the agreement is frequently advantageous.

It is to be noted that the charter and by-laws are supposed to contain and usually do contain everything outside the statute and common law that affects the new company. Therefore, any agreements and understandings between the interested parties as to the powers of stock and the general management of the corporation must be expressed either in the charter or by-laws, and if not so expressed, are usually invalid or incapable of enforcement.

#### § 147. Organization of Corporation.

If the number of partners is less than the smallest number required by statute as incorporators, the services of relatives, friends or employees may be enlisted for the incorporation and these same parties may also later act as directors if desirable. In this latter event the usual statute requirement that directors must be owners of record of at least one share of the company's stock is commonly satisfied by those in control assigning one share to each of the acting parties. Such assigned stock is usually actually and permanently transferred as an equivalent for the time and trouble involved in a "dummy" directorship. At times, however, while given in due form, such stock is after proper assignment by the receiving party, at once taken back and held by the donor. The recip-

ient then appears on the books of the company as the owner of record of such stock and is therefore legally qualified to act as a director. As a matter of fact, however, the actual ownership of the stock rests with the party to whom it was re-assigned, and he may at any time assert this ownership by presenting the assigned certificate and demanding that the stock it represents be placed in his own name. To do so would, however, disqualify the "dummy" director and necessitate some new arrangement of the directory.

Often the wives of the partners are brought into the corporation as incorporators and as directors and are, at times, made stockholders to considerable amounts. This is on occasion a most excellent arrangement. In case of the death of the husband it leaves the corporate holdings exactly where they should be, without danger of failure and without legal proceedings of any kind.

If the firm is incorporated in an outside state, a resident director is usually necessary. This prospective director also usually acts as one of the incorporators.

As a matter of course, the active partners of the firm are usually elected as directors and also as officers of the incorporated business. If the required number of directors be more than the number of partners, as where a partnership of two is incorporated and three directors are necessary, additional directors must be secured. Usually these are "dummy" direc-

tors qualified as described for the purpose. Also if the partners are of even number, as two or four, they will probably wish additional directors to make the number of the board uneven. This is not essential but is customary to prevent the possibility of dead locks. At times, however, the even board may be preferred, any occasional dead locks being fought out as was done in the partnership.

If the partners are but two in number, and, upon the incorporation of the firm, wish the equality of power between them preserved, while the statutes require a board of three, a dummy director may be elected and then resign, his place being left unfilled. The two former partners then have full power to act for the corporation as they constitute a majority of the board. The only objection to the plan is found in the fact that the continued absence, disability or death of one of the directors would leave the board without a quorum and without power to fill the vacancy unless such power were expressly given by charter or by-laws. This would necessitate action by the stockholders to re-establish the board. Sometimes the third director is retained on the board, but it is provided that no important board action—or any board action—may be taken except by unanimous vote of the entire board. Then no action may be taken without the concurrence of the two former partners, and the equality of power in the management is maintained.

The arrangements indicated while entirely possi-

ble and proper, and in common use, require the services of a thoroughly qualified and skilful lawyer as otherwise statute law may be inadvertently violated, or the corporation itself may be so tied up that the conduct of its business becomes impossible.

#### § 148. Transfer of Business.

As soon as the directors and officers of the new corporation have been elected and its organization is thus completed, it is ready to take over the business and property of the old firm and assume full control. At their first meeting the stockholders pass a resolution in accordance with the agreement previously entered into by the partners, authorizing and instructing the directors to purchase the partnership property and business and issue the stock of the corporation in exchange therefor. The directors at their first meeting in pursuance of the stockholders' resolution then formally accept the proposition to take over the business and property of the firm, and authorize the officers to receive the same and issue the stock of the corporation in payment therefor in accordance with the accepted terms. (See Chs. XIII, XIV; also Forms 19, 20, 21.)

By due assignment of the firm the business is then transferred to the corporation. Usually the assignment includes all goods and other stock, cash on hand and in bank, accounts and bills receivable, real estate, leases, fixtures, patents, trade-marks, goodwill and anything else of value belonging to the firm. Any desired reservations, however, may be made, as for instance the cash on hand, or certain accounts,

or particular real estate. Usually it is specified that all debts, contracts and liabilities of the firm are to be assumed by the new corporation.

These assignments are executed in the firm name by the partners and are handed over to the officers of the corporation. These latter then deliver in exchange the duly issued stock of the corporation in accordance with the agreed terms. This transaction makes the stock full-paid. It also vests the business and property of the former partnership in the corporation. The officers of the company then take charge of the business and the transaction is complete. The business is the same as it was before and is in the hands of the same persons, but the liabilities and method of operation are from the legal standpoint entirely different.

After its stock in the new corporation has been received and distributed among the partners, the old firm is usually dissolved.

#### § 149. Conduct of Business Under New Form.

After incorporation the business of the former partnership is usually conducted much as before, especially if there were but two or three partners and all were actively engaged in the business. Usually after the organization meetings, the former partners—as officers and directors—take entire charge of the corporate business and manage it as they did before its incorporation by informal conferences and mutual agreement as occasion arises. This laxity of corporate management may be carried too far, but where

the officers and directors constitute all the parties in interest and all are agreed, there is but little danger from the informality of the method. The treasurer should, however, handle the funds of the corporation and perform his other duties in strict accordance with the by-laws and the resolutions of the board of directors.

A corporation of this kind where no stock is sold to outsiders, where but few are interested and where those few are, in the main, either officers or directors, is called a "close corporation." Such a company rarely takes the trouble to hold annual meetings unless some dissatisfaction, or other cause makes a change in the directory advisable. Otherwise the directors and officers hold over from one year to another, and until one of the parties active in the management dies or retires, no changes are made. When such an emergency does arise the advantages of the corporate form are manifest. Its neglected formalities are then at once brought into play and the corporate mechanism is readily adjusted to the changed conditions.

#### § 150. Changing Books.

Though not strictly relevant, it may be said that the changing of the partnership books to corporation books is usually a matter of no great difficulty. The capital or stock account is kept in the corporate name thereafter, and the individual accounts with the partners are closed.

"The only new features introduced into the books of account when a private or partnership business is transferred to a corporation are those which relate directly to the mechanism of the corporate form. Thus the interests of the parties forming the corporation are represented by stock and a 'Capital Stock' account is necessary. Profits when divided are declared as dividends and a 'Dividend' account must be opened. Stock returning to the corporation either by purchase or by donation becomes treasury stock and a 'Treasury Stock' account is required. The corporate losses or gains find their ultimate resting place in a 'Surplus' account. Bonds when issued require a 'Bond' account, and accounts must also be kept with the interest on these bonds as it accrues from month to month."\*

New books though usual are not at all necessary when the partnership accounts are transferred to the corporation. "If the partnership books are to be continued as the corporate books when a partnership is incorporated, the procedure is simple. The accounts of the partnership books are balanced, those showing loss or gain are closed into 'Profit and Loss' account, and this account is then charged off to the individual accounts of the partners. The capital stock of the corporation is then so issued as to close these partnership accounts."†

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\*Bentley on "Corporate Finance and Accounting," page 215.

†Bentley on "Corporate Finance and Accounting," page 233.



## PART IV.—CORPORATE FORMS.

### CHAPTER XVII.

### SUBSCRIPTION LISTS.

#### Form 1.—Subscription List. Usual Form.

##### SUBSCRIPTION LIST.

##### THE VERASCOPE CAMERA COMPANY.

To be Incorporated under the Laws of New York.

Capital Stock.....\$25,000.

Shares.....\$100 each.

We, the undersigned, hereby severally subscribe for and agree to take, at its par value, the number of shares of the Capital Stock of the Verascope Camera Company set opposite our respective names, and agree to pay therefor in cash on demand of the Treasurer as soon as said Company is organized.

Troy, N. Y., September 20, 1909.

NAMES.	ADDRESSES.	SHARES.	AMOUNT.
David B. Ewbank....	Troy, New York.....	15	\$1,500 00
Henry Brown.....	Syracuse, New York	10	1,000 00

This is the simplest form possible. It will be found sufficient for small corporations where the purposes



and conditions of subscription are well understood. All the essential features of the proposed company should be incorporated in the subscription list and no material change should be made later, otherwise the subscriptions may be voided. Subscribers must be persons competent to contract. In event of litigation the courts construe subscription lists liberally and in accordance with their intent. (See §§ 41, 99.)

It should be remembered that subscriptions under such a list are—until the organization of the corporation—mere promises without consideration and therefore revokable by the subscriber. To avoid this element of uncertainty subscription lists are sometimes drawn with a trustee acting for the proposed corporation, so that subscriptions thereunder are binding as soon as made. The following form is of this nature.

**Form 2.—Subscription List. Trustee's.**

.....

SUBSCRIPTION LIST.  
HARVEY BRASS COMPANY.

To be Incorporated under the Laws of New York for the Manufacture of Brass and Metal Ware.

Capital Stock.....\$200,000.  
Shares.....\$100 each.

We, the undersigned, hereby severally subscribe at par for the number of shares of the capital stock of the Harvey Brass Company set opposite our respective signatures, and hereby promise and agree to pay therefor as follows:

Five (5%) Per Cent. of subscription on demand to Henry M. Shannon, as Trustee for the said Company, such payment, or

so much thereof as may be necessary, to be used for the preliminary and incorporating expenses of said Company; Thirty (30%) Per Cent. of subscription to the Treasurer of the Company ten days after the incorporation thereof, and the remainder of subscription at such times and in such instalments as may be prescribed by the Board of Directors.

New York, July 16, 1909.

NAMES.	ADDRESSES.	SHARES	AMOUNT
Willoughby Knight..	32 Nassau St., N. Y.	25	\$2,500 00

### Form 3.—Subscription Blank. Individual.

#### SUBSCRIPTION BLANK.

THE NEW ALBANY RUBBER COMPANY.

60 Liberty St., New York.

To be Incorporated under the Laws of New Jersey.

Capital Stock.....\$500,000.

Shares.....\$100 each.

I hereby subscribe for Twenty-five (25) shares of the Capital Stock of The New Albany Rubber Company at the par value thereof, and agree to pay Fifty (50 %) Per Cent. of such subscription on demand of the Treasurer so soon as said Company is incorporated; the remainder to be paid at such times and in such amounts, not exceeding Ten (10 %) Per Cent. of said subscription in any one month, as may be prescribed by the Board of Directors.

Unless one-half the capital stock of said Company is reliably subscribed by the 30th day of December, 1909, and the Company incorporated within thirty days thereafter, this subscription shall be void and of no effect.

Name, HENRY McCONNELL,

Address, 1763 Chestnut St.,  
Philadelphia, Pa.

Dated Sept. 15, 1909.

The above form is usually mailed, accompanied by such statement, prospectuses and explanations as may be necessary. Any material misstatement of fact in the subscription blank or the accompanying papers renders the subscription void at the option of the subscriber.

The same general form of blank is frequently employed when stock is to be sold after incorporation, such modifications being made as are necessary to adapt it to the changed conditions.

## CHAPTER XVIII.

### STOCK CERTIFICATES.

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As a rule the stock certificates in common use contain all the essential requirements, differing only in the arrangement of matter, manner of expression, etc. The legality of a certificate of stock is not affected in any way by the style in which it is prepared. One written with pen and ink is as legally effective as the finest engraved certificate. From a business standpoint, however, certificates should be neat and tasteful and of reasonably good quality. The stock exchanges require a certain prescribed excellence of finish in the certificates of stock which are listed with them.

Usually the officers to sign stock certificates are designated by the by-laws of the corporation, though in some states, as New Jersey, the signing officials are designated by the statutes.

The words "full-paid and non-assessable" should not appear upon certificates unless the stock which they represent has really been paid for in full, in cash or in property. (See generally §§ 42, 119.)

## Form 4.—Stock Certificate with Stub.

.....	.....	.....	.....
Certificate No. 25.	No. 25.	Incorporated under the Laws of	20 Shares.
For 20 shares.		The State of Maine.	
Dated August 10th, 1909.		WELDON MANUFACTURING COMPANY.	
Issued to		Capital Stock.....\$50,000.	
Henry S. Jenison,		Common Stock.....\$30,000.	
25 William St.,		Preferred Stock.....\$20,000.	
New York City.		Full-paid and Non-assessable.	
Issued against surrendered			
Certificate No. 16.			
Received the above certificate			
this 12th day of August, 1909.			
HENRY S. JEMISON.			
Certificate No. 25,			
cancelled.....190			
Certificates issued in its stead			
as follows:			
No..... for .....Share			
No..... " " " " " "			
No..... " " " " " "			

THIS IS TO CERTIFY that Henry S. Jenison is the owner of Twenty Shares of the Common Stock of the Weldon Manufacturing Company, transferable only on the books of the Company by the said owner thereof in person or by duly authorized attorney, upon surrender of this certificate properly endorsed.

Witness the Seal of the Company and the signatures of its duly authorized officers this tenth day of August, 1909.

JAMES P. HARRIS, HENRY E. EHRLING,  
Treasurer. President.  
SHARES, \$100 EACH.

## Form 5.—Preferred Stock Certificate.

No. 15.

10 Shares.

Incorporated under the Laws of  
The State of Maine.

## WELDON MANUFACTURING COMPANY.

Capital Stock.....\$50,000.

Common Stock.....\$30,000.

Preferred Stock.....\$20,000.

---

Full-paid and Non-assessable.

---

THIS IS TO CERTIFY that James H. Wilson is the owner of Ten Shares of the Preferred Stock of the Weldon Manufacturing Company, transferable only on the books of the Company by the said owner, in person or by duly authorized attorney, upon surrender of this Certificate properly endorsed.

The preferred stock represented by this certificate is entitled to an annual dividend of Six (6%) Per Cent. payable out of the net profits of the Company before any dividend is paid upon the Common Stock. Should the net profits in any year be insufficient to pay said preferred dividend, either in whole or in part, any unpaid portion thereof shall become a charge against the net profits of the Company and shall be paid in full out of said net profits before any dividends are paid upon the Common Stock.

Said preferred stock is subject to redemption at the option of the Company at any time after Ten (10) Years from the first day of August, 1909, either by payment of One Hundred and Five (\$105) Dollars per share and any accumulated dividends, or if so elected by the Company, by exchange thereof of common stock of the Company, at the rate of four shares of said common stock for each three shares of preferred stock so redeemed, any preferred stock redeemed under this provision to be cancelled and not thereafter to be reissued.

Said preferred stock is not entitled to vote at stockholders'

meetings of the Company, nor to participate in profits beyond its fixed, preferential, cumulative, annual dividend of Six Per Cent.

{ CORPORATE } Witness the Seal of The Company and the sig-  
 { SEAL } natures of its duly authorized Officers this  
 first day of September, 1909.

JAMES P. HARRIS,

Treasurer.

HENRY E. EHRLING,

President.

SHARES \$100 EACH.

*(Stub same as for Common Stock except that heading should read "Preferred Stock." This requirement is, however, quite commonly neglected.)*

.....

The conditions under which preferred stock is issued should appear upon its face, as in the above form. (See § 89.)

#### Form 6.—Assignment of Stock Certificate. In Blank.

.....  
 For Value Received...hereby sell, assign and transfer unto  
 ..... Shares  
 of the Capital Stock represented by the within Certificate, and do  
 hereby irrevocably constitute and appoint.....,  
 my Attorney to transfer the said stock on the books of the within-  
 named Company, with full power of substitution in the premises.

WILLIAM CLEPHANE.

Dated.....190

In presence of:

JERE H. McLAIN.

.....

This form of assignment appears upon the back of the stock certificate. It is the only form in common use. The signature when a transfer is to be made must correspond exactly with the name upon the face of the certificate.

If this assignment is duly signed by the owner of the stock and this signature properly witnessed, but the names of the party to whom the transfer is made and of the attorney are omitted as in the preceding form, the assignment is said to be made in blank. The certificate may then be sold and passed from hand to hand without further assignment until some purchaser wishes to make himself a holder of record. The blanks in the assignment are then filled in as shown in the following form, the certificate surrendered and a new certificate taken out in the name of the owner of the stock. (See § 44.)

Usually the name of the secretary of the company is inserted as the attorney who is to make the transfer on the books of the company, though any other suitable person might be named instead.

**Form 7.—Assignment of Stock Certificate. Complete.**

.....  
For Value Received, I hereby sell, assign and transfer unto Wilson Montgomery of New York City, Twenty-five (25) Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint Samuel H. Colesworth, my Attorney to transfer the said stock on the books of the within-named Company, with full power of substitution in the premises.

WILLIAM CLEPHANE.

Dated September 1, 1909.

In presence of:

JERE H. McLAIN.



## CHAPTER XIX.

### CHARTER FORMS AND STATE FEES.

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Charter forms vary in the different states in accordance with the varying statute requirements, though the general requisites of the charter are much the same in all. The following charter applications—or charters as they become after allowance—show the forms in use in New York, New Jersey and Arizona. The forms presented are simple, but, within their scope, are clear and complete and serve to give an idea of the usual charter form. They are included in order to render intelligible the many references in the present volume to the charter and its requirements.

It is to be noted that the charter is in form merely an application for a charter. If properly drawn and duly presented with payment of the required fees, the charter application is allowed and filed as a matter of course. It thereupon immediately becomes the charter of the new corporation and this latter is then fully authorized to perfect the corporate organization and proceed with its business. (See Ch. III and § 100.)

## Form 8.—New York Charter.

.....  
CERTIFICATE OF INCORPORATION

of the

LEDoux MANUFACTURING COMPANY.  

---

We, the undersigned, all being of full age and two-thirds being citizens of the United States, and one of us a resident of the State of New York, for the purpose of forming a Corporation under the Business Corporations Law of the State of New York, do hereby certify and set forth:

*First*—The name of said Corporation shall be

“LEDoux MANUFACTURING COMPANY.”

*Second*—The purposes for which said Corporation is formed are as follows:

1. To buy, sell, manufacture and generally deal in all manner of tools, machinery, devices, appliances and supplies as used in wagon making and the allied trades.
2. To lease, buy, sell, use and hold all such property, real or personal, as may be necessary or convenient in connection with the said business.
3. To do any or all things set forth in this certificate as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might do, and in any part of the world.

*Third*—The amount of Capital Stock of said Corporation shall be Fifty Thousand Dollars (\$50,000).

*Fourth*—The number of shares composing said capital stock shall be Five Hundred (500) Shares of the par value of One Hundred Dollars (\$100) each, and the amount of capital with which said Corporation will begin business is Five Hundred Dollars (\$500).

*Fifth*—The principal business office of said Corporation shall be

in the Borough of Manhattan, in the City, County and State of New York.

*Sixth*—The duration of said Corporation shall be perpetual.

*Seventh*—The number of directors of said Corporation shall be three.

*Eighth*—The names and post-office addresses of the directors of said Corporation for the first year are as follows:

NAMES.	ADDRESSES.
Henry Willis Ledoux.....	25 Liberty St., New York City.
Henry B. Divine.....	30 Broadway, New York City.
Manley Scolwood.....	68 Montague St., Brooklyn, N. Y.

*Ninth*—The names and post-office addresses of the subscribers to this certificate, and the number of shares of stock which each agrees to take in said Corporation, are as follows:

NAMES.	ADDRESSES.	SHARES.
Henry Willis Ledoux...	25 Liberty St., New York City.....	20
Henry B. Devine.....	30 Broadway, New York City.....	15
Manley Scolwood.....	68 Montague St., Brooklyn, N. Y....	15
Sarah H. Adams.....	710 Lexington Ave., New York City	10

*Tenth*—Pursuant to Section 52 of the Stock Corporations Law, as amended, this Corporation shall have power to purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stocks, bonds or other obligations.

IN WITNESS WHEREOF, we have made and signed this certificate in duplicate this fourteenth day of August, one thousand nine hundred and nine.

HENRY WILLIS LEDOUX.  
HENRY B. DEVINE.  
MANLEY SCOLWOOD.  
SARAH H. ADAMS.

STATE OF NEW YORK, }  
County of New York, } ss.:

Personally appeared before me this 14th day of August, 1909, Henry Willis Ledoux, Henry B. Devine, Manley Scolwood and Sarah H. Adams, to me personally known to be the persons



described in and who executed the foregoing certificate, and severally acknowledged that they executed the same for the purposes therein set forth.

{ NOTARIAL }  
{ SEAL. }

JAMES H. SCULLY,  
Notary Public for  
New York County.

.....  
**Form 9.—New Jersey Charter.**  
.....

CERTIFICATE OF INCORPORATION  
of the  
CARHART DRUG COMPANY.

We, the undersigned, for the purpose of forming a corporation under and by virtue of the provisions of an act of the Legislature of the State of New Jersey, entitled "An act concerning corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof, do hereby severally subscribe for and agree to take the number of shares of stock of the said corporation hereinafter placed opposite our respective names, and do further certify and set forth as follows:

*First*—The name of said corporation shall be

"CARHART DRUG COMPANY."

*Second*—The location of its principal office in the State of New Jersey shall be at No. 15 Exchange Place, Jersey City.

The name of the agent who shall be therein and in charge thereof, upon whom process against this corporation may be served, is the Corporation Trust Company of New Jersey.

*Third*—The objects for which this corporation is formed are:

(a) To manufacture, prepare, compound, mix, combine, buy, sell and generally deal in all manner of chemicals, chemical products, drugs and pharmaceutical compounds and preparations, and to patent, register or otherwise protect the same.

(b) To obtain, purchase or otherwise acquire formulæ, patents and secret processes for the manufacture and prepa-

ration of chemicals, drugs and the compounds and preparations thereof and to operate under, sell, assign, grant licenses in respect of, or otherwise turn the same to account.

(c) To enter into, carry out or otherwise turn to account contracts of every kind; to have and maintain offices within and without the State; to acquire, hold, mortgage, lease and convey or otherwise use or dispose of real and personal property in any part of the world, and in general to carry on such operations and enterprises and to do all such things in connection therewith as may be permitted by the laws of New Jersey and be necessary or convenient in the conduct of the Company's business.

*Fourth*—The total authorized stock of the corporation shall be twenty-five thousand dollars (\$25,000), divided into two hundred and fifty (250) shares of the par value of one hundred dollars (\$100) each, and the amount of capital stock with which said corporation will begin business is five thousand dollars (\$5,000).

*Fifth*—The names and post-office addresses of the incorporators and the number of shares subscribed for by each are as follows:

NAMES.	ADDRESSES.	SHARES.
Willis J. Carhart.....	15 Exchange Place, Jersey City, N. J....	40
Sheldon McCammis.....	" " " "	5
John B. Whelan.....	" " " "	5

*Sixth*—The period of existence of said corporation shall be unlimited.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 21st day of July, A. D. nineteen hundred and nine.

WILLIS J. CARHART. [L. S.]

SHELDON MCCAMMIS. [L. S.]

JOHN B. WHELAN. [L. S.]

In the presence of:

HARMON WATSON.

THOMAS O'CONNELL.

STATE OF NEW JERSEY, }  
County of Hudson, } ss.:

Be it remembered, that on this 21st day of July, A. D. nineteen hundred and nine, before the undersigned personally ap-

peared Willis J. Carhart, Sheldon McCammiss and John B. Whelan, who, I am satisfied, are the persons named in and who executed the foregoing certificate, and I, having first made known to them, and each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

JOHN M. JOHNSON,  
Master in Chancery of New Jersey.

.....

Such a certificate of incorporation must be personally signed and sealed by all the subscribers to the capital stock who are named in the instrument, and be then acknowledged by them before any officer qualified under the New Jersey laws to take acknowledgments for deeds of real estate.

#### Form 10.—Arizona Charter.

.....

#### ARTICLES OF INCORPORATION.

KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, have this day associated ourselves together for the purpose of forming a corporation under and pursuant to the Laws of the Territory of Arizona, and for that purpose do hereby adopt Articles of Incorporation as follows:

##### ARTICLE I.

The name of the corporation shall be Andes Exploration and Development Company.

##### ARTICLE II.

The principal place of business of this corporation within the Territory of Arizona shall be at Phoenix, Maricopa County, and the principal place or places of transacting business outside of Arizona shall be at New York City, State of New York, where meetings of Stockholders and Directors may be held and all business transacted.

## ARTICLE III.

The general nature of the business proposed to be transacted is as follows:

1. Mining, smelting, refining, reducing and dealing in and with all sorts of ores, metals and minerals, and the prospecting, locating, opening, operating and developing of mines, oil wells, quarries and mineral deposits of all descriptions.

2. Constructing and operating mills, factories, machine shops and industrial plants of all descriptions, and the buying, selling and dealing in and with all supplies, merchandise and materials, raw or prepared, useful or convenient in connection therewith.

3. Establishing and conducting savings institutions, loan, trust and investment companies, and guarantee and insurance institutions, either directly or indirectly, in such form and manner as the laws may permit.

4. Farming, planting and tilling the soil and the operating of farms, ranches, orchards, plantations and haciendas, and all industries appurtenant thereto.

5. Constructing and operating tramroads, canals, irrigating systems, steamboats, steamships and ships and vessels of all kinds.

6. Buying, selling, leasing and improving lands, town sites and territories and laying out, plotting, subdividing and colonizing the same.

## ARTICLE IV.

The authorized amount of capital stock of this corporation shall be Two Million, Five Hundred Thousand (\$2,500,000) Dollars, divided into Two Hundred and Fifty Thousand (250,000) Shares of the par value of Ten (\$10) Dollars each. At such times as the Board of Directors may by resolution direct, said capital stock shall be paid into this corporation, either in cash or by the sale and transfer to it of real or personal property, contracts, services, or any other valuable right or thing for the uses and purposes of said corporation, in payment for which shares of the capital stock of said corporation may be issued and the capital stock so issued shall thereupon and thereby become

and be fully paid-up and non-assessable, and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive.

#### ARTICLE V.

The time of the commencement of this corporation shall be the date of the filing of a certified copy of these Articles of Incorporation in the office of the Auditor, and the termination thereof shall be twenty-five years thereafter, with the privilege of renewal as provided by law.

#### ARTICLE VI.

The affairs of this corporation shall be conducted by a Board of Directors, and the following named shall constitute the Board of Directors until their successors are elected: George N. Wright, James Powers, Henry Decker, Harvey S. McLain, George Hessler. Thereafter the Board of Directors shall be elected from among the Stockholders at annual Stockholders' meeting to be held on the tenth day of January of each year.

#### ARTICLE VII.

The Directors shall have power to adopt and amend by-laws for the government of the corporation, to fill vacancies occurring in the Board from any cause, and to appoint an Executive Committee and vest said Committee with all of the powers granted the Directors by these Articles.

#### ARTICLE VIII.

The highest amount of indebtedness, direct or contingent, to which the corporation shall be subject at any one time shall be One Hundred Thousand (\$100,000) Dollars.

#### ARTICLE IX.

The private property of the stockholders and officers of the corporation shall be exempt from all corporate debts of any kind whatsoever.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this first day of September, 1909.

GEORGE N. WRIGHT. (Seal.)

JAMES POWERS. (Seal.)

HENRY DECKER. (Seal.)



County of New York, }  
 STATE OF NEW YORK, } ss.:

Personally appeared before me this 1st day of September, 1909, George N. Wright, James Powers and Henry Decker, to me personally known to be the persons described in and who executed the foregoing certificate, and severally acknowledged that they executed the same for the purposes therein set forth.

{ NOTARIAL }  
 { SEAL }

JOHN S. HELLER,  
 Notary Public for  
 New York County.

Form II.—Comparative Table. Organization  
 Expenses.

Including all Filing and Incidental Fees.

CAPITAL STOCK OF COMPANY.	NEW JERSEY.	NEW YORK.	DELA- WARE.	MAINE.	ARI- ZONA.*
\$1,000	\$35.00	\$16.00	\$25.00	\$27.00	\$50.00
5,000	35.00	17.50	25.00	27.00	50.00
10,000	35.00	20.00	25.00	27.00	50.00
25,000	35.00	27.50	25.00	67.00	50.00
50,000	35.00	40.00	25.00	67.00	50.00
100,000	35.00	65.00	25.00	67.00	50.00
500,000	110.00	265.00	65.00	67.00	50.00
1,000,000	210.00	515.00	115.00	117.00	50.00
5,000,000	1,010.00	2,515.00	365.00	517.00	50.00
10,000,000	2,010.00	5,015.00	615.00	1,017.00	50.00

It should be noted that the foregoing table includes filing and incidental fees as well as the state fees.

The list of states includes those most generally re-

\*Including cost of publication; also fee (\$10) of statutory agent in Arizona for first year.

sorted to for "outside" incorporation. West Virginia is omitted because of the onerous fees and requirements now imposed which remove the state from among those desirable for this purpose.

The New Jersey organization fee is 20c. for each \$1,000 of capitalization with \$25 as a minimum fee. The incidental fees approximate \$10. Non-resident corporations must maintain a state office with agent in charge thereof; cost \$25 to \$50 per annum.

The New York organization fee is 1-20 of 1% of the capitalization; minimum \$1. Incidental fees approximate \$15. No state office need be maintained by corporations operating entirely outside the state.

The Delaware organization fee is 10c. for each \$1,000 of capitalization up to a capitalization of \$2,000,000 with a minimum fee of \$10. 5c. is charged on each \$1,000 in excess of \$2,000,000, with a minimum fee on this excess of \$10. Incidental fees, approximately \$15. State office and resident agents cost from \$25 to \$50 per annum.

The Maine organization fees are as follows:—On capitalizations not exceeding \$10,000—\$10; over \$10,000 but not exceeding \$500,000—\$50; on larger capitalizations, \$10 for every \$100,000 of capitalization. Incidental fees approximately \$17.

In Arizona no organization tax is imposed but various fees aggregating about \$35, must be paid. These fees are the same for all incorporations regardless of the amount of capitalization. An office must be maintained in Arizona by non-resident corporations at a usual cost of \$10 per annum.

Form 12.—Comparative Table. Annual Franchise  
Taxes.

CAPITAL STOCK OF COMPANY.	NEW JERSEY.	NEW YORK.	DELA- WARE.	MAINE.	ARIZONA.
\$1,000	\$1.00	\$1.50	\$5.00	\$5.00	None
5,000	5.00	7.50	5.00	5.00	"
10,000	10.00	15.00	5.00	5.00	"
25,000	25.00	37.50	5.00	5.00	"
50,000	50.00	75.00	10.00	5.00	"
100,000	100.00	150.00	10.00	10.00	"
500,000	500.00	750.00	25.00	50.00	"
1,000,000	1,000.00	1,500.00	50.00	75.00	"
5,000,000	4,000.00	7,500.00	150.00	275.00	"
10,000,000	4,250.00	15,000.00	275.00	525.00	"

It is to be noted that the franchise tax in the foregoing table has nothing to do with the tax imposed on personal or real property belonging to the corporation, which is the same in every respect as the tax imposed on personal or real property belonging to individuals. The franchise tax is merely a graduated charge for the privilege of doing business as a corporation.

The New Jersey franchise tax is 1-10 of 1% on any capitalization up to \$3,000,000; 1-20 of 1% on any excess up to \$5,000,000; and for every \$1,000,000 over \$5,000,000, \$50. Manufacturing and mining corporations employing at least one-half their capital in the state are exempt.

The New York taxation given in the above table is calculated at the rate of one and one-half per cent.,

being based upon the supposition that all the capital is issued, that it is all employed in the state and that the corporation is paying six per cent. annual dividends. Any difference in any of these particulars affects the annual franchise tax. If a New York corporation is conducting all its business outside the state, merely maintaining an office in the state for its books and meetings, it pays no franchise tax. Mining, laundrying and manufacturing corporations employing not less than forty per cent. of their capital in the state are exempt from the franchise tax.

The Delaware franchise tax on capitalizations of \$25,000 or less is \$5; over \$25,000 to \$100,000, \$10; over \$100,000 to \$300,000, \$20; over \$300,000 to \$500,000, \$25; over \$500,000 to \$1,000,000, \$50; over \$1,000,000, a further sum of \$25 for each additional \$1,000,000 or part thereof. Manufacturing and mining corporations employing not less than one-half their capital in the state are exempt from the franchise tax.

The Maine franchise tax on all capitalizations not exceeding \$50,000 is \$5 per annum; above \$50,000 but not exceeding \$200,000, \$10; above \$200,000 but not exceeding \$500,000, \$50; above \$500,000 but not exceeding \$1,000,000, \$75. \$50 additional must be paid for each \$1,000,000, or part thereof in excess of \$1,000,000. Manufacturing and mining corporations not exempt.

Arizona imposes no annual franchise tax.

## CHAPTER XX.

### BY-LAWS.

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As the general corporate mechanism is much the same in all corporations, there is a general resemblance between their by-laws. The details of these by-laws should, however, in each case be adapted to the special requirements of the corporation for which they are prepared. (See Ch. iv, "By-laws.")

The set of by-laws which follows, though more particularly intended to illustrate the many references of the present volume to the by-laws, has been proved by long experience, and will afford very excellent material from which to construct the by-laws of any particular corporation. The set, though concise, is perhaps more complete than is entirely necessary for the smaller corporations—a fault that is not serious if the by-laws are properly adapted to the needs of the particular corporation.

#### Form 13.—By-Laws.

.....

BY-LAWS  
of the  
ALBANY MANUFACTURING CORPORATION.

---

#### ARTICLE I.—STOCKHOLDERS' MEETINGS.

1. *The Annual Meeting* of the stockholders of the Company shall be held in the principal office of the Company in New

York City at 10 o'clock A. M. on the 3rd Monday of January of each year—if not a legal holiday; but if a legal holiday, then on the next business day succeeding—for the purpose of electing Directors and the transaction of such other business as may be brought before the meeting.

2. *Special Meetings* of the stockholders shall be held at the principal office of the Company and may be called by the President at his discretion and must be called by him when so directed by resolution of the Board of Directors, or when requested thereto in writing by stockholders holding one-third of the outstanding stock.

3. *Notice of Meetings*, written or printed, for every annual or special meeting of the stockholders shall be prepared and mailed to the post-office address of each stockholder as shown by the stock books of the Company not less than ten days before such meeting, and if for a special meeting such notice shall state the object or objects thereof, and no other business shall be transacted at any such special meetings save that so notified. No notice need be given of adjourned meetings.

4. *A Quorum* at any meeting of the stockholders, save as otherwise prescribed by statute, shall consist of a majority of the voting stock of the Company represented in person or by written proxy. A majority of such quorum shall be necessary to decide any question coming before the meeting. If a quorum is not present at any duly called meeting, a majority of those present may adjourn the meeting from day to day, but until a quorum is secured may transact no business.

5. *Voting at Elections* of Directors shall be by ballot, and shall also be by ballot on any other matter submitted to a stockholders' meeting when so requested by not less than one-fourth in interest of the stockholders present at such meeting. Each stockholder shall be entitled to one vote for each share of stock held by him and such vote may be cast in person or by written proxy.

6. *The Election of Directors* shall be held at the annual meeting of stockholders and shall be conducted by two inspectors of election appointed, after the first election, by the President.

7. *The Presiding Officer* at meetings of stockholders shall

be the President, or in his absence or disability, the Vice-President. In the absence or disability of both of these officers, a Chairman shall be chosen by the stockholders present and shall preside at such meeting. In the absence of the Secretary of the Company, the presiding officer shall appoint a Secretary *pro tem*.

8. *The Order of Business* at the annual meeting and as far as possible at all other meetings of the stockholders, shall be:

1. Reading and Disposal of Any Unapproved Minutes.
2. Annual Reports of Officers and Committees.
3. Election of Directors.
4. Unfinished Business.
5. New Business.
6. Adjournment.

#### ARTICLE II.—DIRECTORS.

1. *The Business and Property* of the Company shall be managed by a Board of Seven (7) Directors, who shall be stockholders continuously during their respective terms of office and who shall be elected annually by ballot by the stockholders for the term of one year and shall serve until the election of their successors. Any vacancies in the Board may be filled by the remaining members of the Board for the unexpired term or terms. Directors shall receive no compensation for their services. Absence from four successive regular meetings of the Board of Directors may, in the discretion of the Board, terminate the membership of the absent director.

2. *The Regular Meetings* of the Board of Directors shall be held in the principal office of the Company in New York City at 3 P. M. on the third Tuesday of each month if not a legal holiday; but if a legal holiday, then on the next succeeding business day.

3. *Special Meetings* of the Board of Directors, to be held in the principal office of the Company in New York City, may be called at any time by the President or by any three members of the Board, or may be held at any time and place without notice and for the transaction of any business by unanimous written consent of all the members or by the presence of all the members at such meeting.

4. *Notices* of both regular and special meetings shall be mailed by the Secretary to each member of the Board not less than five days before any such meeting, and notices of special meetings shall state the purpose thereof, and no other business shall be transacted at a special meeting save as so notified unless by unanimous consent of all the members. No notice need be given of adjourned meetings.

5. *A Quorum* at any meeting shall consist of a majority of the entire membership of the Board. A majority of such quorum shall be necessary to decide any question that may come before the meeting. If a quorum is not present at any duly assembled meeting, a majority of those present may adjourn the meeting from day to day but may transact no other business until a quorum is secured.

6. *Voting.* Each member of the Board present in person at any meeting shall have one vote upon all matters voted upon at such meeting.

7. *The Presiding Officer* at meetings of the Directors shall be the President, or in his absence or disability, the Vice-President. In the absence or disability of both these officers, the directors present at any meeting shall appoint a Chairman who shall preside at such meeting. In the absence of the Secretary of the Company, the presiding officer shall appoint a Secretary *pro tem*.

8. *Officers* of the Company shall be elected by the Board of Directors at their first meeting after the election of Directors each year. If any office becomes vacant during the year, the Board of Directors shall fill the same for the unexpired term. The Board of Directors shall fix the compensation of the officers and agents of the Company. An officer may be removed at any time by a two-thirds vote of the entire membership of the Board.

9. *The Order of Business* at any regular meeting or special meeting of the Board of Directors shall be:

1. Reading and Disposal of Any Unapproved Minutes.
2. Reports of Officers and Committees.
3. Unfinished Business.
4. New Business.
5. Adjournment.



## ARTICLE III.—OFFICERS.

1. *The Officers* of the Company shall be a President, who shall be elected from among the Directors, a Vice-President, a Secretary and a Treasurer, all of whom shall be elected for one year and shall hold office until their successors are elected and qualify. The positions of Secretary and Treasurer may be united in one person.

2. *The President* shall preside at meetings of stockholders and of Directors; shall have general supervision of the affairs of the Company; shall sign or countersign all certificates, contracts and other instruments of the Company as authorized by the Board of Directors; shall make reports to the Directors and stockholders, and perform all such other duties as are incident to his office or are properly required of him by the Board of Directors. In the absence or disability of the President, the Vice-President shall exercise all his functions.

3. *The Secretary* shall issue notices for all meetings of both stockholders and Directors; shall keep their minutes; shall have charge of the seal and corporate stock books; shall sign with the President all instruments requiring such signature, and shall make such reports and perform such other duties as are incident to his office or are properly required of him by the Board of Directors.

4. *The Treasurer* shall have the custody of all moneys and securities of the Company and shall keep regular books of account and balance the same each month. He shall sign or countersign such instruments as require his signature; shall perform all duties incident to his office or that are properly required of him by the Board, and shall give bond for the faithful performance of his duties in such sum and with such sureties as may be required by the Board of Directors.

## ARTICLE IV.—STOCK.

1. *Certificates of Stock* shall be in form approved by the Board of Directors; shall be numbered consecutively; be issued in numerical order from the stock certificate book; be signed by the President and Secretary, and be sealed with the corporate seal. A record of each certificate issued shall be kept on the stub thereof.

2. *Transfers of Stock* shall be made only upon the books of the Company, and before a new certificate is issued, the old certificate properly endorsed shall be surrendered. Surrendered certificates shall be cancelled and be attached to their proper stubs in the stock certificate book. The stock books of the Company shall be closed to transfers twenty days before general elections and ten days before dividend days.

3. *The Treasury Stock* of the Company shall include such issued and outstanding stock of the Company as may be acquired by purchase, donation or otherwise and shall be held subject to disposal by the Board of Directors. Such stock shall neither vote nor participate in dividends while held by the Company.

#### ARTICLE V.—DIVIDENDS AND FINANCE.

1. *Dividends* shall be declared only from surplus profits at such times as the Board of Directors shall direct, and no dividend shall be declared that will impair the capital of the Company.

2. *The Moneys* of the Company shall be deposited in the name of the Company in such bank or trust company as the Board of Directors shall designate, and shall be drawn out only by check signed by the Treasurer and countersigned by the President.

#### ARTICLE VI.—SEAL.

1. *The Corporate Seal* of the Company shall consist of two concentric circles, between which appears the name of the Company, and in the centre shall be inscribed "Incorporated 1909, New York," and such seal, as impressed on the margin hereof, is hereby adopted as the Corporate Seal of the Company.

#### ARTICLE VII.—AMENDMENTS

1. *These By-Laws* may be amended, repealed or altered, in whole or in part, by a majority vote of the entire outstanding stock of the Company, at any regular meeting of the stockholders, or at any special meeting where such action has been announced in the call and notice of such meeting.

2. *The Board of Directors* may adopt additional by-laws in harmony therewith, but shall not alter nor repeal any by-laws adopted by the stockholders of the Company.

The foregoing by-laws comply with the requirements of the statutes of New York. When the set is to be used in another state, the corporation laws of that state should be consulted and the by-laws as given be modified to conform to their provisions. As a rule the necessary changes to meet the statute requirements of the different states are small, but it is imperative that they be made. (See Ch. iv.)

The by-laws are usually prepared by the attorney having charge of the incorporation, in advance of the first meeting of stockholders. When presented to this meeting they should properly be read article by article and then adopted as a whole as the by-laws of the company. (See Form 22.) They are then usually ordered entered in the book of minutes immediately succeeding the copy of the certificate of incorporation. When so entered they should be certified by the secretary, or by the president and secretary, as in the following form:

#### Form 14.—Certification of By-Laws.

.....  
We, the undersigned, President and Secretary of the Albany Manufacturing Company, do hereby certify that the foregoing are the By-Laws of the said corporation duly adopted by the stockholders thereof, at their first meeting held in the City of New York, on the 10th day of October, 1909, all as shown by the Minutes of said meeting.

IN WITNESS WHEREOF, we have hereunto affixed our official signatures and the corporate seal of said corporation on this 15th day of October, 1909.

{ CORPORATE }  
{ SEAL }  
}

JAMES T. HOWELL, President.  
THOMAS TRENT, Secretary.

## Form 15.—Certified Extract from By-Laws.

.....  
SPRINGVIEW WATER COMPANY.

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TRANSCRIPT FROM BY-LAWS.

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## "ARTICLE III.—OFFICERS.

"Sec. 2. *The President.*

"The President when present shall preside at all meetings of the Stockholders and of the Board of Directors; shall sign all certificates of stock; shall sign or countersign as may be necessary all such bills, notes, checks, drafts and other instruments as may pertain to the ordinary course of the Company's business, and shall sign when duly authorized thereto all contracts, orders, deeds, licenses and other instruments of a special nature.

"He may also in the absence or disability of the Treasurer, endorse checks, drafts and other negotiable instruments for deposit or collection, and shall with the Secretary sign the minutes of all meetings over which he presides."

---

I, John H. Bowen, Secretary of the Springview Water Company, do hereby certify that the above is a true and correct copy of Section 2, Article III, of the duly adopted By-Laws of this Company, and in testimony thereof I have hereunto affixed my official signature and the seal of the Company in the City of Saratoga, State of New York, on this 21st day of September, 1909.

{ CORPORATE }  
{ SEAL }

JOHN H. BOWEN,  
Secretary.

CHAPTER XXI.

FIRST MEETINGS.

---

Form 16.—Proxy. First Meeting of Stockholders.

.....

PROXY  
for  
FIRST STOCKHOLDERS' MEETING.

---

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, one of the incorporators and a subscriber to the stock of the Jersey City Paving Company, do hereby constitute and appoint John N. Michael of Jersey City, New Jersey, my true and lawful attorney, with full powers of substitution and revocation, to represent me at the first meeting of the stockholders of said corporation to be held on the 20th day of August, 1909, and at any meeting postponed or adjourned therefrom, hereby granting my said attorney full power and authority to act for me at said meeting, and, in my name, place and stead, to vote thereat upon the stock of said corporation subscribed for by me, or upon which I may then be entitled to vote, in the election of Directors and in the transaction of any and all other business pertaining to the affairs of the Company that may be brought before said meeting, all as fully as I might or could do if personally present, and I hereby ratify and confirm all

that my said attorney, or his substitute, shall lawfully do at such meeting in my name, place and stead.

IN WITNESS WHEREOF, I have hereunto affixed my signature and seal, this 13th day of August, 1909.

FRANK M. WILLIS. . [L. S.]

In presence of:

JAMES CARHART.

.....

This proxy is formal and complete. It is valid for the first meeting and any meetings adjourned therefrom, but then expires without revocation. (See Ch. XXIV.)

### Form 17.—Call and Waiver. First Meeting of Stockholders.

.....

#### CALL AND WAIVER OF NOTICE

for

#### FIRST MEETING OF STOCKHOLDERS.

---

We, the undersigned, being all of the incorporators and stockholders of the Chilworth Manufacturing Company, do hereby call the first meeting of the stockholders thereof, to be held in the office of James P. Gregory, 35 Liberty Street, New York City, August 10th, 1909, at 10 o'clock A. M., for the organization of the Company and the transaction of all such business as may be incident thereto, and we hereby waive all requirements as to notice of such meeting and consent to the transaction thereat of any and all business pertaining to the affairs of the Company.

JAMES H. MARSHALL.

PERCY SHELDON.

HARRY ADAMS.

JAMES CHILWORTH..

JAMES P. GREGORY.

New York, August 10, 1909.

It is to be borne in mind that immediately after the granting of its charter, the corporation has neither by-laws, directors nor officers; hence the importance of the first, or organization, meetings. These initial meetings of stockholders and directors are most conveniently assembled by means of calls and waivers of notice. These, *if signed by all parties concerned*, are all-sufficient and save the time and trouble involved in personal notification or notice by publication. If, however, any person or persons entitled to be present at such a meeting, should not sign, such omission might invalidate the proceedings of the whole meeting. (See §§ 53, 54, 120.)

The foregoing call and waiver is somewhat informal, but is short, simple and entirely sufficient for the smaller companies, or for the larger companies when no specially important action is contemplated.

It is to be noted that in New York the first meeting of stockholders loses something of its importance because the directors for the first years are named in the charter. In most of the states they are elected by the stockholders and this election is the most important business coming before the meeting and should be specifically mentioned in the call and waiver. In such case the purposes of the meeting would read as follows:—

“for the purpose of receiving charter, electing directors, adopting by-laws and the transaction of such other business as may be incident or necessary to the organization of the company.”

## Form 18.—Call and Waiver. First Meeting of Directors.

.....

### CALL AND WAIVER OF NOTICE for FIRST MEETING OF DIRECTORS.

We, the undersigned, being all the Directors of the Chilworth Manufacturing Company, do hereby call the first meeting of the Directors of said Company, to be held in the office of James P. Gregory, 35 Liberty Street, New York City, at 11 o'clock A. M., on the 10th day of August, 1909, for the purpose of electing officers of the Company, acting upon a proposition to exchange property for the stock of the Company and doing all such other things as may be necessary or desirable in connection with the organization of the Company or for the promotion of its business, and we hereby waive all statutory and by-law requirements as to notice of time, place and objects of said meeting and consent to the transaction thereof of any and all business pertaining to the affairs of the Company.

JAMES CHILWORTH.  
JAMES P. GREGORY.  
PERCY SHELDON.

New York City, August 10, 1909.

.....

The two meetings are usually called for the same day, that of the stockholders coming first and that of the directors an hour or so later. (See §§ 67, 127.)

## Form 19.—Issuance of Stock for Property. Proposal.

.....

192 MONTAGUE ST., Brooklyn, N. Y.,  
August 8, 1909.

To the Stockholders and Directors of

THE CHILWORTH MANUFACTURING COMPANY,  
35 Liberty St., New York City:

GENTLEMEN—In exchange and full payment for the entire cap-



ital stock of the Chilworth Manufacturing Company, including with the consent of the incorporators, the shares subscribed for by them, I hereby offer you the plant for the manufacture of cooper's supplies and machinery, belonging to me and located on the water front near the foot of East 128th Street, New York and bounded and described as follows:—(*Description.*) Included with said plant are all the machinery, tools, apparatus and materials, raw or manufactured, now in said buildings or on the premises, the whole being sold as a going concern, and all of said plant and property being free and unincumbered and of the reasonable value of \$60,000.

If the above proposition is accepted, the entire capital stock of your Company, excepting the shares subscribed for by the incorporators, which are to be issued to them, is to be issued to my order, full-paid and non-assessable, against the delivery to your representatives of such duly executed deeds and assignments of the above plant and property as may be satisfactory to your attorneys.

In the event of your acceptance of the foregoing proposition, I shall donate and turn over to your Company not less than \$25,000 face value of the stock received by me, such stock to be used at the discretion and under the direction of your Board of Directors, for the purpose of providing working capital for the Company.

Yours very truly,

HENRY M. GRENELLE.

.....

This proposal is merely a convenient method of getting the matter of issuing stock for property before the meetings of stockholders and directors. Such a proposal, when followed by resolutions of the stockholders approving it, and resolutions of the directors accepting it, constitutes a complete contract. The minutes of the respective meetings of the stockholders and directors should give complete and accurate records of the proceedings in connection with the ex-

change of stock for property. The forms of resolutions which follow might be appropriately adopted by the stockholders and directors respectively if the proposal is to be accepted. (See §§ 124, 125, 130.)

**Form 20.—Issuance of Stock for Property. Stockholders' Resolution.**

.....  
WHEREAS, A proposition has been received from Mr. Henry M. Grenelle, offering to sell, assign and convey to this Company the property near the foot of East 128th St., New York, known as the Grenelle Manufacturing Plant, in exchange for the entire capital stock of the Company to be issued full-paid and non-assessable to the order of the said Henry M. Grenelle, save as to the shares subscribed for by the incorporators; and

WHEREAS, It appears to the stockholders of this company that the said property is desirable for the purposes of the Company and is reasonably worth the purchase price thereof:

Now, THEREFORE, BE IT RESOLVED, That the said proposition for the exchange of said property for the entire capital stock of this Company, as set forth in this proposition, be and hereby is approved, and the Board of Directors of this Company are hereby authorized, empowered and instructed to accept the said proposition and to cause the entire capital stock of the Company to be issued for the said property, in accordance with the terms of said proposition.

.....

**Form 21.—Issuance of Stock for Property. Directors' Resolution.**

.....  
WHEREAS, The property offered in exchange for the Capital Stock of this Company by Mr. Henry M. Grenelle in his proposition to the Company is adjudged by this Board to be of the reasonable value of Sixty Thousand (\$60,000) Dollars, and to be necessary for the use and lawful purposes of the Company.

RESOLVED, That the said property be and hereby is, in accordance with the authorization and instructions of the stockholders of this Company, accepted in full payment for the said capital stock of the Company, in accordance with the terms of said proposition; and the proper officers of this Company are hereby authorized and directed to receive the duly executed transfers and assignments of the property specified in said proposition and to issue in exchange therefor the entire stock of the Company, full-paid and non-assessable, to such person or persons as may be designated by the written orders of the aforementioned Henry M. Grenelle, except as to the shares subscribed for by the incorporators, which shall be issued to them or their order.

.....

It is to be noted that the decisive action is taken by the directors in the foregoing resolution, and that the stockholders' resolution merely approves the transaction and authorizes the directors to take action. (See § 130.)

The wording of the directors' resolution adjudging the property to be of the proper value and to be necessary for the use and lawful purposes of the company is the usual form. Also it is in accord with the New Jersey statutes on this subject which read as follows:—

“In the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive.” (Gen. Corp. Law of N. J., § 49.)

New York and some other states have followed the New Jersey laws in regard to this matter, and in any state where it is allowable to issue stock for property, a fair transaction of the kind would be upheld.

## CHAPTER XXII.

### MINUTES OF FIRST MEETINGS.

---

The following minutes of the first meeting of stockholders follow the New York practice. With the addition of an election of directors, they would be suitable for most of the other states. In New Jersey, Delaware and some other states it would be necessary to pass a resolution designating the state office and resident agent. (See Ch. XIII.)

#### Form 22.—Minutes. First Meeting of Stockholders.

.....

#### CHILWORTH MANUFACTURING COMPANY.

---

##### MINUTES OF FIRST MEETING OF STOCKHOLDERS. Held August 10, 1909.

---

Pursuant to written call and waiver of notice, the first meeting of stockholders of the Chilworth Manufacturing Company was held in the office of James P. Gregory, 35 Liberty Street, New York City, at 10 o'clock A. M., on the 10th day of August, 1909, with all the stockholders present, either in person or by proxy.

Mr. James Chilworth was chosen Chairman and called the meeting to order. Mr. Percy Sheldon was appointed Secretary of the meeting.

The following stockholders were present in person:

NAME.	SHARES SUBSCRIBED.
James Chilworth .....	25
Percy Sheldon .....	10
James P. Gregory .....	10

The following stockholders were present by proxies duly presented and filed with the Secretary:

NAME.	NAME OF PROXY.	SHARES SUBSCRIBED.
James H. Marshall.....	Warren Coles.....	10
Harry Adams.....	Harvey Clinton.....	5

The Secretary presented the call and waiver of notice pursuant to which the meeting was held, duly signed by all the incorporators of the Company. Said call and waiver was ordered spread upon the Minute Book immediately following the minutes of the meeting. (*See Form 17.*)

The Chairman then presented a certified copy of the Certificate of Incorporation of the Company and stated that said certificate had been filed with, and recorded by, the Secretary of State on the 7th day of August, 1909, and that a duplicate copy had been filed for record with the County Clerk on the 9th day of August, 1909.

Upon motion, duly made and carried, said Certificate of Incorporation was ordered received, the Directors named therein were recognized as the Directors of the Company, and the Secretary was instructed to spread the said Certificate in full upon the first pages of the Book of Minutes.

The Chairman also presented a form of By-laws, prepared by James P. Gregory, Esq., Counsel for the Company, which was read, article by article, and, as a whole, unanimously adopted as the By-laws of the Company, and ordered entered in the Minute Book immediately following the Certificate of Incorporation.

The Secretary then presented a written proposal from Mr. Henry M. Grenelle, of 192 Montague Street, Brooklyn, offering to transfer and assign to the Company certain property, as set forth in said proposal, in exchange for the entire capital stock of the Company. (*See Form 19.*)

After due consideration said proposal was ordered received and the following resolution in regard thereto was moved, seconded and passed by unanimous vote:

*(Insert here Resolution of Stockholders, Form 20.)*

There being no further business before the meeting, it was adjourned.

JAMES CHILWORTH,  
Chairman.

PERCY SHELDON,  
Secretary.

.....

Mr. Grenelle's proposition might have been entered in full in the minutes of this first meeting of stockholders, and, if so, would appear after the minutes, or, if the secretary prefers, in the body of the minutes just after the paragraph descriptive of the proposition and its presentation by the secretary. In such case it would be prefaced by the following statement:

"Said proposition was ordered received and spread upon the minutes and is as follows:"

Inasmuch, however, as the proposition should properly appear in the minutes of the directors' meeting where it is formally acted upon, it is better omitted from the stockholders' minutes unless there is some special reason for its inclusion.

In any other state than New York, an election of directors would be an important feature of the minutes of the first stockholders' meeting. This election would be held immediately after the adoption of the by-laws and would be duly recorded in the minutes just after the entry relating to the by-laws. The recognition of the directors set forth in the paragraph accepting the charter would, of course, in such event be omitted.

Form 23.—Minutes. First Meeting of Directors.  
.....CHILWORTH MANUFACTURING COMPANY.  
—————

## MINUTES OF THE FIRST MEETING OF DIRECTORS.

Held August 10, 1909.  
—————

Pursuant to written call and waiver of notice, the Board of Directors of the Chilworth Manufacturing Company held its first meeting in the office of James P. Gregory, 35 Liberty Street, New York City, at 11 o'clock A. M., on the 10th day of August, 1909.

Mr. James Chilworth was chosen as temporary Chairman and Mr. Percy Sheldon was appointed temporary Secretary of the meeting.

All the members of the Board were present as follows:

James Chilworth.

James P. Gregory.

Percy Sheldon.

On request of the Chairman the Secretary presented the Call and Waiver of Notice, pursuant to which the meeting was held, duly signed by all the members of the Board. It was ordered spread upon the Minute Book immediately following the minutes of the meeting. (*See Form 15.*)

The Chairman then appointed Messrs. James P. Gregory and Percy Sheldon, tellers to conduct the election for officers of the Company, the officers so elected to serve for the remainder of the corporate year and until the election of their successors.

The votes of those present were then duly cast by ballot, resulting in the election by unanimous vote of the following officers:

President .....James Chilworth.

Vice-President .....James P. Gregory.

Secretary and Treasurer .....Percy Sheldon.

The permanent officers of the Company thereupon took charge of the meeting.

The Secretary presented a form of stock certificate for approval, which was by motion adopted as the form for the stock certificates of the Company as prepared by its Directors, and the Secretary was instructed to spread the said form upon the pages of the Minute Book immediately following the record of the meeting then in progress.

The President then presented a written proposal from Mr. Henry M. Grenelle, of Brooklyn, offering to assign to the Company, in exchange for its entire Capital Stock, certain specified property. The said proposal was ordered spread in full upon the minutes and is as follows:

*(Insert here Proposal to Exchange Property for Stock, Form 19.)*

The President also presented a resolution of the stockholders, approving the said proposal and authorizing and instructing the Directors to accept the same and to take such action in regard thereto as might be necessary to make such acceptance fully effective.

The following resolution was thereupon moved, seconded and unanimously adopted:

*(Insert here Resolution of Directors, Form 21.)*

Upon motion duly made, seconded and passed, the following resolution was adopted:

*(Insert here Resolution from Form 52.)*

The following motions were then made, seconded and duly passed by the unanimous vote of all present:

MOVED, That the President be hereby authorized to lease for the use of the Company such suitable office or offices in this City as may be necessary for the proper transaction of the Company's business, such lease to be for one year, with privilege of renewal, at an annual rental not exceeding \$900, and the office so secured to be the principal office of the Company within the State of New York.

MOVED, That the Secretary be hereby instructed to procure a corporate seal and a book of five hundred stock certificates; also all such record, stock and transfer books, and books of account and stationery and office supplies, as may be necessary for the proper operation and record of the Company's business and transactions.



MOVED, That the Secretary be instructed to prepare or have prepared, in due and proper form, a certificate of the payment of one-half the capital stock of the Company, and, after the due execution and verification thereof, to file said certificate as required by law, and to spread a copy thereof upon the pages of the minute book following the record of the present proceedings.

MOVED, That the Treasurer be hereby authorized and instructed to pay from the Company funds the expenses properly incurred in the incorporation of the Company or in connection therewith.

MOVED, That Messrs. William H. Coles and Richard Jennings be hereby appointed inspectors of election to serve at the first annual election of Directors of the Company, and at any election of directors by the stockholders previous thereto.

There being no further business for consideration the meeting was adjourned.

JAMES CHILWORTH,  
President.

PERCY SHELDON,  
Secretary.

.....

In the minute-book, following the preceding minutes, should appear the call and waiver of notice and the form of stock certificate adopted at the meeting; also copy of the certificate of payment of one-half the capital stock of the company. The proposal for the exchange of property for the stock of the company might be entered in the same way after the record of the proceedings, but is used so directly as a basis for the subsequent proceedings that it is perhaps better incorporated in the minutes as shown.

If bond is required of the treasurer, and the by-laws do not specify the amount, surety or sureties, and other details, action thereon should be taken at this

first meeting and should appear just after the record of the election of officers as follows:

"By motion, duly seconded and passed, the amount of the Treasurer's bond was fixed at \$1,000, such bond to be in form and with sureties approved by the Board.

"The Treasurer-elect then presented a bond of the Guaranty Bonding Company of New York City for said amount. The form of the instrument and the surety thereon meeting with the approval of the Board, the bond as presented was formally accepted and placed in custody of the President."

(See generally Ch. xiv, "First Meeting of Directors." For treasurer's bond see Form 74.)

CHAPTER XXIII.  
CALLS AND NOTICES.

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Form 24.—Notice of Annual Meeting.

.....

ALBANY MILLING COMPANY,  
142 Capitol Street, Albany, New York.

---

JULY 30, 1909.

MR. JOHN J. WELLMAN,  
163 Capitol Street, Albany, N. Y.:

DEAR SIR,—You are hereby notified that the Annual Meeting of the Stockholders of the Albany Milling Company will be held in the Company's office at 10 o'clock A. M., Tuesday, August 21, 1909, for the purpose of electing Directors and for the transaction of such other business as may come before the meeting.

Respectfully,

SHERMAN H. MONTGOMERY,  
Secretary.

.....

In those states where the statutes require publication of the notice of the annual meeting, the following form will be found suitable. Notice by mail should be sent in addition to the publication notice when this latter is used, as announcements in the papers are rarely effective. (See § 54.)

**Form 25.—Notice of Annual Meeting. Publication.**

.....

ALBANY MILLING COMPANY.

—————

The Annual Meeting of the Stockholders of the Albany Milling Company will be held at the office of the Company, 142 Capitol Street, Albany, New York, August 21st, 1909, at 10 o'clock A. M., for the purpose of electing Directors and for the transaction of such other business as may be brought before said meeting.

The stock transfer books of the Company will be closed at 3 o'clock P. M. August 2nd, 1909, and remain closed until 10 o'clock A. M. August 23rd, 1909.

SHERMAN H. MONTGOMERY,  
Secretary.

.....

When a special meeting of either stockholders or directors is to be held, time is saved and all risk of faulty notice avoided if the meeting is assembled by means of a call and a waiver of notice signed by all the interested parties. Such call and waiver for a stockholders' meeting assembled to discuss and act upon a proposition to sell the entire assets of the company is as follows: (See §§ 53, 54.)

**Form 26.—Call and Waiver. Special Meeting of Stockholders.**

.....

THE SHELBY BRASS COMPANY.

—————

CALL AND WAIVER FOR SPECIAL MEETING OF STOCKHOLDERS.

—————

We, the undersigned, being all the stockholders of The Shelby Brass Company, hereby call a special meeting of the stockholders of said Company to be held in the Company's office, No. 145 Main Street, Harrisburg, Pa., at 10 o'clock A. M., on the 1st

day of October, 1909, for the purpose of considering and acting upon a proposition for the sale of the entire assets of the Company, and we hereby waive all statutory and by-law requirements as to notice of time, place and objects of said meeting, and agree to the transaction thereat of any and all business pertaining to the affairs of the Company.

Harrisburg, Pa.,

September 29, 1909.

ALFRED LANGUEDOC.

GEORGE WELLS BROWN.

JAMES P. HARMON.

HENRY M. ALLEN.

.....

If for any reason the call and waiver is not available or desirable, special meetings may be assembled by means of a suitable call duly followed by the secretary's notice. (See § 54.) The by-laws usually prescribe the requirements of the call. The following form is applicable when special meetings may be called by two or more directors of the company.

**Form 27.—Call for Special Meeting. Stockholders'.**

.....

CALL FOR SPECIAL MEETING OF STOCKHOLDERS.

We, the undersigned, Directors of the Shelby Brass Company, do hereby call a special meeting of its stockholders to be held in the office of the Company, 145 Main Street, Harrisburg, Pa., on the 1st day of October, 1909, at 10 o'clock A. M., for the purpose of considering and acting upon a proposition to sell the entire assets of the Company and for the transaction of all such business as may be necessary or desirable in connection therewith; and we hereby authorize and instruct the Secretary of the Company to send out notices of said special meeting in accordance with the by-law requirements of this Company.

Harrisburg, Pa., September 25, 1909.

HENRY M. ALLEN.

ALFRED LANGUEDOC.

To Mr. WILLIAM J. WILLFORD,

Secretary of the SHELBY BRASS COMPANY.

This call is handed, or mailed, to the secretary, who then, in accordance with its specifications, sends out notice of the meeting.

The following form of notice is generally applicable. The authority under which it is issued should be specified in the notice.

**Form 28.—Notice of Special Meeting. Stockholders'.**

.....

**THE SHELBY BRASS COMPANY.**

HARRISBURG, PA., September 25, 1909.

Mr. JAMES P. HARMON,  
Lykens, Pa.

DEAR SIR,—You are hereby notified that, pursuant to call duly signed by two Directors of the Company, a special meeting of the stockholders of the Shelby Brass Company will be held in the Company's office, No. 145 Main Street, Harrisburg, Pa., October 1, 1909, at 10 o'clock A. M., for the purpose of considering and acting upon a proposition to sell the entire assets of the Company, and for the transaction of any and all business necessary or desirable in connection therewith.

Yours very truly,

WILLIAM J. WILFORD,  
Secretary.

.....

This notice may be used as shown, or with the name and address of the particular stockholder omitted. This latter practice is common where the notices are printed, the address appearing only on the envelope in which the notice is enclosed. Frequently the notice is printed on a postal card, in which case the address appears only on the address side of the card.

For regular meetings of directors notice is sent to every member of the Board, as may be prescribed by the by-laws, usually from five to ten days before the date of meeting.

**Form 29.—Notice of Regular Meeting. Directors'.**

.....  
WELLMAN ENGINE COMPANY.

305 Broadway.

New York, July 27, 1909.

MR. JAMES H. HALLOCK,  
654 Fifth Ave., City.

DEAR SIR:

You are hereby notified that the regular monthly meeting of the Board of Directors of the Wellman Engine Company will be held in the offices of the Company at 305 Broadway, August 7th, 1909, at 10 o'clock A. M.

Respectfully,

HENRY WELLMAN,  
Secretary.

.....  
Special meetings of the board of directors may be assembled by call and waiver where it is desirable to save time. The form in such case may be as follows: (See §§ 67, 68.)

**Form 30.—Call and Waiver. Special Meeting of Directors.**

.....  
THE FREMONT STEAMSHIP COMPANY.

CALL AND WAIVER FOR SPECIAL MEETING OF DIRECTORS.

We, the undersigned, being all the Directors of The Fremont Steamship Company of New York City, hereby call a special

meeting of the Board of Directors of said Company to be held in the Company's office, 133 South Street, New York City, on July 15, 1909, at 3 o'clock P. M., to elect a Treasurer of the Company and to transact any other necessary business in connection therewith, and we hereby waive all statutory and by-law requirements as to notice of time, place and purpose of said meeting and consent to the transaction thereof of any and all business pertaining to the affairs of the Company.

New York City, July 13, 1909.

WILHELM VON LOSSBERGH.  
WILSON T. CORWIN.  
HENRY BREWSTER SYMMES.  
MORRIS T. CORNELL.  
JAMES B. HARTLEIGH.

.....

When the call and waiver can not be used, the meeting must be assembled by a call followed by notice. The following form may be used when the by-laws authorize the president to summon such meetings.

**Form 30a.—Call for Special Meeting. Directors'.**

.....

THE FREMONT STEAMSHIP COMPANY.

133 South St., New York.

July 12, 1909.

To the Secretary of the

FREMONT STEAMSHIP COMPANY.

I hereby call a special meeting of the Board of directors to be held in the office of the Company at 3 o'clock P. M., on the 15th day of July, 1909, for the purpose of acting upon the resignation of the Treasurer of the Company, Mr. John Ellis, for the election of his successor, in the event of the acceptance of said resignation, and for the transaction of any other business



in connection therewith that may be necessary; and you are hereby instructed to send out notices of said meeting as required by the by-laws of this Company.

WILHELM VON LOSSBERGH,  
President.

.....

This call should be handed or mailed to the secretary, and it then becomes the duty of that official to see that the required notices of the meeting are duly sent out. The form of this notice may be as follows:

**Form 31.—Notice of Special Meeting. Directors'.**

.....

THE FREMONT STEAMSHIP COMPANY.

133 South St., New York.

---

July 13, 1909.

MR. JAMES B. HARTLEIGH,  
178 West End Ave., City.

DEAR SIR:—You are hereby notified that, pursuant to call of the President, a special meeting of the Board of Directors of this Company will be held in its office at 3 o'clock P. M., on the 15th day of July, 1909, for the purpose of acting upon the resignation of the Treasurer of the Company, Mr. John Ellis, for the election of his successor, if said resignation is accepted, and for the transaction of such other business in connection therewith as may be necessary.

Respectfully,  
WILLIS CAREY,  
Secretary.

## CHAPTER XXIV.

### PROXIES.

---

The proxy is merely a special power of attorney, given by a stockholder and authorizing the party to whom it is given to represent and act for such stockholder at one or more stockholders' meetings of the particular company.

Proxies must be in writing and either the original or a certified copy should be filed with the secretary of the company at or before the time of any meeting where such proxy is to be used.

Revocations of proxies should also be in writing and be filed with the secretary of the company. A second proxy covering the same stock as does an outstanding proxy acts as a revocation of the first even though it does not specifically so state.

Proxies should be signed and sealed by the maker and be witnessed by at least one person. Ordinarily they do not require acknowledgment. A proxy may be—and frequently is—given with the name of the acting party omitted. Such blank proxy is usually handed or sent to the secretary of the company or to

some associate or friend who will be in attendance, and, at the time of the meeting, is filled in with the name of some suitable person present who is thereby empowered to act.

A party authorized to act by a proxy can not delegate this authority unless he is expressly and formally empowered so to do by the giver of the proxy. If the stock represented by a proxy is sold the proxy is thereby made void and of no effect. (See generally § 57.)

### Form 32.—Simple Proxy. Unlimited.

.....

#### PROXY.

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, do hereby constitute and appoint John Calhoun my true and lawful attorney to represent me at all meetings of the stockholders of the Corliss Malting Company, and for me and in my name and stead to vote thereat upon the stock standing in my name on the books of said Company at the times of said meetings, and I hereby grant my said attorney all the powers that I should possess if personally present.

Witness my signature and seal this 10th day of August,  
1909.

WILLIAM H. COLES. [L. S.]

In presence of

FREDERICK SPENCER.

.....

This proxy is short and simple as to form, but is somewhat broad in its scope. It is unlimited as to time, and, until revoked or terminated by some statutory limitation, applies to every stockholders' meeting,

regular, special or adjourned. It authorizes the appointee to participate in any way that any stockholder might at such meetings, and, generally, places the appointee in the position of the owner himself in reference to any corporate action.

The proxy given might be limited as to time, say to a six months' term, by adding the phrase "held on or before the 10th day of January, 1910," immediately after the name of the company in the body of the proxy, or it might be limited to a single meeting by proper specification, as "to represent me at the special meeting of the stockholders of the Corliss Malting Company to be held on the 15th day of August, 1909."

### Form 33.—Formal Proxy. Annual Meeting.

.....

#### PROXY.

---

KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, stockholders of the Corliss Malting Company, do hereby constitute and appoint Henry Bronson our true and lawful attorney, with full power of substitution and revocation, for us and in our names, place and stead, to vote upon the stock then standing in our respective names upon the books of said Company, at the annual meeting of the stockholders thereof, to be held in the office of the Company, 100 Broadway, New York City, August 10th, 1909, at 10 o'clock A. M., and at any meeting postponed or adjourned therefrom, hereby granting to our said attorney full power and authority to act for us at said meeting, and, in our names and stead, to vote thereat upon our said stock in the election of Directors and in the transaction of such other business as may be brought before the said meeting, all as fully as we might or could do if personally present, and we hereby ratify

and confirm all that our said attorney, or his substitute, shall lawfully do at such meeting in our names, place and stead.

IN WITNESS WHEREOF, we have hereunto affixed our signatures and seals this 5th day of August, 1909.

HOWARD BACHMAN. [L. S.]

SAMUEL ADAMS. [L. S.]

JASPER LONSDALE. [L. S.]

In presence of:

WILLIAM H. JORDON

as to Howard Bachman.

FRANCIS B. SMYTHE

as to Samuel Adams

and Jasper Lonsdale.

.....

This proxy is specific and formal. It does not convey any greater or more complete powers than the shorter form already given. It is, however, conventional and will be found more satisfactory under formal conditions or where matters of much importance are to be considered.

#### Form 34.—Revocation of Proxy.

##### .....

##### REVOCATION OF PROXY.

I, the undersigned, do hereby revoke and annul any and all proxies or powers of attorney heretofore given by me, as far as the same may authorize or empower any person or persons to represent me, vote in my name and stead, or act for me in any way whatsoever, at any meeting or meetings of the stockholders of the Corliss Malting Company.

Witness my signature and seal this 5th day of October, 1909.

NATHAN GOODHUE. [L. S.]

In presence of:

HARVEY MCKAY.

The above revocation is sweeping and when delivered to the secretary of the company annuls all outstanding proxies for the stock mentioned. If any proxy is to be excepted from the general revocation, that fact should be specifically mentioned, or the revocation might be limited to the particular proxies to be annulled, leaving any other outstanding proxies unaffected. (See generally § 57; also Form 16.)

## CHAPTER XXV.

### MINUTES.

---

The minutes of a meeting should be a concise, accurate record of the important proceedings of that meeting. No attempt should be made to record everything that occurs. Unimportant matters are properly omitted and those of more importance entered as briefly as is consistent with clearness and accuracy.

The detail and formality of the secretary's record will depend largely upon the nature of the proceedings. Where action is unimportant, or, if important, is unanimous, but little formality or particularity of detail is required in the minutes. If, however, matters are important and there is a difference of opinion, every essential detail should be entered in full. Motions and resolutions should be given verbatim, and, in the record of directors' meetings, the names of those voting and how their votes were cast should be stated in full. In matters of unusual importance the essential features of discussion, and motions made but lost will sometimes be recorded.

It may be said generally, however, that minutes, outside of the routine statements as to time, place, attendance, etc., are intended to be a record of what is done—not of discussion or proposed action—and only such matters should be entered as are necessary to con-

stitute an accurate record of the actual transactions of the meeting.

Minutes are signed by the secretary and president and if properly kept are competent evidence of the proceedings of the meetings recorded.

### Form 35.—Annual Meeting of Stockholders.

.....  
ELLENVILLE WOOLEN MILLS COMPANY.

Minutes of Annual Meeting.

Held August 25, 1909.

The stockholders of the Ellenville Woolen Mills Company assembled in annual meeting in the office of the Company at 11 o'clock A. M., August 25, 1909.

The meeting was called to order by Mr. Herbert Wilson, President of the Company. Mr. Henry H. Elgin acted as Secretary.

There were present 4,500 shares out of 5,000 shares of stock outstanding, constituting a legal quorum.

The Secretary submitted a copy of the notice of meeting with his certificate attached, showing that copies thereof had been mailed to each stockholder of record on or before the 14th day of August, 1909. Copies of the "Ellenville Record" under date of August 14th and 21st, containing due notice of said meeting, were also submitted.

No objection being offered, the proof of notice of meeting as submitted was ordered received and filed. (*For notice of meeting see Forms 24 and 25.*)

The minutes of the preceding annual meeting were then read and approved.

The President stated that the next business in order was the annual reports of officers and committees, but added that his own report, as President, was not then ready to present, as matters of much importance had come up within a few days of the date of the meeting and were then pending, which he wished to present in connection with his report, and that the



stockholders would therefore be called together in special meeting at a later date for the purpose of receiving and considering the President's report.

The Treasurer's annual report was then presented, and, by request, was read by him. No objection being offered the report was ordered received and filed.

The Committee of Stockholders appointed at the preceding annual meeting to examine and report upon the plan and equipment of the Company submitted an extended report, which was ordered received and filed.

The President then announced the election of five directors to serve for the ensuing year as next in order, and appointed Edward E. Simes and James Warrington inspectors of election.

The following names were placed in nomination: Henry F. Disbrow, Percy Warren, Ellison Hyde, George S. Stephenville, Harry O. French, William S. Symington, Allen S. O'Dell, Henry S. Ellsworth and Herbert Wilson.

The inspectors of election having been first duly sworn, took charge of the election. Voting was by ballot and resulted in the election of the following Directors:

Percy Warren.

Harry O. French.

William S. Symington.

Henry S. Ellsworth.

Herbert Wilson.

The report of the Stockholders' Committee on the plant and equipment of the Company was then taken up for consideration.

By request, Mr. David McMahon, Chairman of the Committee, gave a synopsis of the report, stating as the conclusion of the Committee that while both buildings and equipment were in good condition, the equipment was very much out of date and should be replaced, and that the changes in the buildings necessary for the installment of new and modern machinery should be begun without delay. Mr. McMahon stated that the cost of such new installation would be about \$50,000 but that he fully believed this entire amount would be returned to the Company in the shape of increased profits in the first year of operation with the new equipment.

After a full discussion of the matter the following resolution was adopted:

RESOLVED, That the stockholders of this Company do hereby approve of the recommendations made in the report of Mr. McMahon's Committee and that a copy of said report be submitted to the Directors of the Company, and that the Directors be, and hereby are, authorized and directed to carry out the recommendations of said report.

The President then read a request from the Board of Directors that the by-laws be so amended as to constitute three members of the Board a quorum, instead of four as was then the case. The reasons for this change were fully stated, and by unanimous vote, Section V, Article II of the By-Laws was amended to read as follows:

"Three members of the Board of Directors shall constitute a quorum, etc."

There being no further business before the meeting it was adjourned.

HERBERT WILSON,  
President.

HENRY H. ELGIN,  
Secretary.

.....

The publication of notice of meeting, and the appointment of inspectors of election referred to in the above minutes are required by the laws of New York but would be optional in most other states. Publication of notice is quite commonly neglected in the smaller New York corporations.

A record of those in attendance at the meetings of stockholders should be kept by the secretary. In the smaller corporations the names of those present in person or by proxy might appear in the minutes. In the larger corporations a special record is kept.

The resolution in the above minutes authorizing and instructing the board of directors to carry out the committee's recommendations as to plant and equipment is not essential as the board already has power

to do so without the resolution, and if it saw fit to disregard the stockholders' mandate could not be called to account therefor. It is, however, an expression of the stockholders' wishes and as such has weight with the board. Also not infrequently the board will ask for such an endorsement of any proposed action when of special importance or of great expense in order that the stockholders may share the responsibility.

**Form 36.—Regular Meeting of Directors.**

.....  
**ELLENVILLE WOOLEN MILLS COMPANY.**

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Minutes of Regular Meeting of Directors  
Held August 27, 1909.

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The Board of Directors of the Ellenville Woolen Mills Company met in regular meeting in the office of the Company at Ellenville, New York, on the 27th day of August, 1909 at 3 o'clock P. M.

President Wilson presided over the meeting and Secretary Elgin recorded its proceedings.

Present, Messrs. Warren, French, Symington and Wilson, constituting a quorum of the board.

The minutes of the previous meeting were read and approved. The minutes of the special meeting of Directors held August 12th, 1909, were also read, but their approval was objected to by Mr. French on account of the statement therein that he had offered a resolution intended to reduce the wages of the Company's employees. Mr. French stated that so far from offering that resolution, he had opposed it and voted against it, and asked that the minutes be corrected in accordance with these facts. There being some difference of opinion as to what actually occurred, the correction asked for by Mr. French was directed by motion, Messrs. Warren and French voting in the affirmative, Mr. Wilson voting in the negative, and the President

declining to vote. By the same vote the minutes, as corrected, were then ordered approved.

The Treasurer submitted a special report showing the financial condition of the Company and the probable receipts and expenditures for the first quarter of the year. The report was ordered received and filed.

The President then stated that he had in his possession a copy of a report made by a Committee of the Stockholders on the condition of the Company's plant, and making recommendations for its improvement. In connection with this report the President submitted a copy of a resolution passed at the annual meeting of stockholders authorizing and directing the Board of Directors to act in accordance with the recommendations of the aforesaid Committee's report. The report and resolution were ordered received and filed.

The President also reported that the by-laws, as requested by the Board, had been so amended at the recent stockholder's meeting as to constitute three a quorum at meetings of the Directors.

The Board then proceeded to the election of officers. This was by ballot and resulted in the re-election of the old officers of the Company to their respective positions, viz: President, Mr. Herbert Wilson; Treasurer, Mr. Howard Gannett; Secretary, Henry H. Elgin.

The report of the Stockholders' Committee was next taken under consideration, and, after some discussion, Messrs. Wilson and Symington were appointed a Committee to determine the condition of the existing equipment and to ascertain the exact cost of the proposed betterments. Also the President was instructed by unanimous motion to call a special meeting of the Board so soon as this Committee was ready to report, the purpose of such meeting being to receive the report of the Committee and take such action in connection therewith as might seem necessary or advisable.

There being no further business before the meeting it was declared adjourned.

HERBERT WILSON,  
President.

HENRY H. ELGIN,  
Secretary.

.....  
(See § 88.)

## Form 37.—Special Meeting of Stockholders.

## CARONDELET SILK COMPANY.

Minutes of Special Meeting of Stockholders

Held July 20, 1909.

Pursuant to formal Call and Notice, the stockholders of the Carondelet Silk Company, assembled in special meeting in the office of the Company, 145 Main Street, Paterson, N. J., at 10 o'clock A. M., on the 20th day of July, 1909.

The meeting was called to order by President Gowey, Secretary Harkness officiating as recording officer.

The entire capital stock of the Company was represented at the meeting either in the person of the owner or by proxy.

The stock represented in person was as follows:

NAME.	AMOUNT.
Samuel T. Adams.....	100 shares.
Willis S. Baker.....	150 "
Henry Buchanan .....	100 "
John F. Gowey.....	500 "
John T. Harkness.....	100 "
James P. Harmon.....	200 "
William Perkins .....	100 "
Sargent P. Wylie.....	150 "

The stock represented by proxies duly filed with the Secretary was as follows:

NAME.	NAME OF PROXY.	AMOUNT.
John F. Aldrich.....	John T. Harkness,	250 shares.
John B. Goodell.....	" " "	150 "
Weldon P. Hunt.....	" " "	200 "

On request of the President, the Secretary presented the Call and Notice pursuant to which the meeting was held. These were ordered entered upon the Minute Book immediately following the minutes of the meeting.

President Gowey then briefly stated the purpose of the meeting to be the consideration of a proposition from the Cumberland Silk Manufacturing Co. of Paterson, for the purchase of the entire property of the Company, including patents, machinery, realty, stock on hand, book accounts, orders and all other assets of the Company, save cash in bank, and bills and accounts receivable, the object of the purchase being the consolidation of the Cumberland and Carondelet businesses under one management. That, if the proposition were accepted, the Cumberland people would organize a Company with a capitalization of \$750,000 to take over and operate the two properties, the price offered for the Carondelet property being \$150,000 in cash and \$150,000 in stock of the new Company.

In conclusion the President advised strongly the acceptance of the proposition, stating that on account of floods and strikes, from both of which the Company had suffered, the Carondelet Company would be unable to pay the accustomed dividend for 1909; that the future outlook was very uncertain, and that the prospects of a strong Company, such as the Cumberland people proposed to organize, were far better in every way than could possibly be the case with a smaller company; and that for the reasons stated, as well as for others that could not be gone into at that time, he considered the acceptance of the proposition advisable and to the interests of the stockholders.

An extended discussion of the matter followed the President's statement, the opinion being expressed by several stockholders that the proposed consolidation was illegal, and numerous questions being asked President Gowey as to the financial features and other details involved in the proposition submitted.

Finally Mr. Buchanan moved that the meeting be adjourned until 10 o'clock A. M. of the following day, in order to give the stockholders time to look into the matter and confer among themselves. The motion was seconded and passed, and the President thereupon declared the meeting adjourned in accordance with said motion.

JOHN F. GOWEY,  
President.

JOHN T. HARKNESS,  
Secretary.

---

Pursuant to the instructions of the foregoing minutes, the following instruments are entered below:

CALL FOR MEETING.

---

Paterson, New Jersey,  
July 12, 1909.

MR. JOHN T. HARKNESS,  
Secretary of the CARONDELET SILK Co.,  
145 Main St., Paterson, New Jersey.

DEAR SIR—In accordance with the authority vested in me by the by-laws of this Company, I hereby call a special meeting of its stockholders, to be held in the office of the Company, No. 145 Main St., Paterson, N. J., on the 20th day of July, 1909, at 10 o'clock A. M., for the purpose of considering and acting upon a proposition to sell the entire assets of the Company, and for the transaction of any and all business in connection therewith that may properly come before said meeting, and I hereby authorize and instruct you to send out notices of said meeting to the stockholders of this Company in accordance with the requirements of its by-laws.

Yours very truly,  
JOHN F. GOWEY,  
President.

NOTICE OF MEETING.

---

Paterson, New Jersey,  
July 14, 1909.

MR. SARGEANT P. WYLIE,  
Montclair, New Jersey.

DEAR SIR,—You are hereby notified that, pursuant to the call of the President, a special meeting of the stockholders of the Carondelet Silk Company will be held in the Company's office, No. 145 Main Street, Paterson, New Jersey, July 20th, 1909, at 10 o'clock A. M., for the purpose of considering and acting upon a proposition to sell the entire assets of the Company, and for the transaction of any and all business necessary or desirable in connection therewith.

Yours very truly,  
JOHN T. HARKNESS,  
Secretary.

## Form 38.—Adjourned Meeting of Stockholders.

## CARONDELET SILK COMPANY.

## Minutes of Adjourned Meeting of Stockholders

Held July 21, 1909.

Pursuant to adjournment, the special meeting of the stockholders of the Carondelet Silk Company reassembled in the office of the Company at 10 o'clock A. M. on the 21st day of July, 1909.

The meeting was called to order by President Gowey, with Secretary Harkness officiating as recording officer.

The stockholders of the Company were all present in person save Messrs. John F. Aldrich, John B. Goodell and Weldon P. Hunt, who were represented by proxies in the hands of Secretary Harkness.

The minutes of the special meeting of stockholders held on the preceding day, and from which the present meeting was adjourned, were read for the information of those present.

After the reading of the minutes, Mr. Buchanan offered the following resolution:

WHEREAS, A proposition has been made by the Cumberford Silk Manufacturing Company of Paterson for the purchase of the entire property of this Company, save cash in bank, and bills and accounts receivable, the consideration offered being One Hundred and Fifty Thousand (\$150,000) Dollars in cash and One Hundred and Fifty Thousand (\$150,000) Dollars face value of stock in a certain new corporation to be formed for the purpose of taking over the business and properties of the two Companies; and

WHEREAS, The stockholders of this Company are favorably impressed with said proposition, but believe that a full legal investigation of the whole matter should be made before proceeding further:

Now, THEREFORE, BE IT RESOLVED, That the stockholders of this Company hereby instruct and authorize the Direc-



tors of the Company to employ such competent legal assistance as may be necessary to investigate and report upon said proposition in all its phases, and, if such investigation shall show that there are no legal objections to the contemplated sale, to accept the said proposition and to do all things necessary to carry such acceptance into effect.

Mr. Buchanan then moved the adoption of the resolution as read. The motion was seconded by Mr. Adams, and, after a short discussion, was carried by the unanimous vote of all present.

There being no further business before the meeting, the President declared it adjourned *sine die*.

JOHN F. GOWEY,  
President.

JOHN T. HARKNESS,  
Secretary.

### Form 39.—Special Meeting of Directors.

#### ELLENVILLE WOOLEN MILLS COMPANY.

##### Minutes of Special Meeting of Directors

Held September 3, 1909.

Pursuant to call of the President, the Board of Directors met in special meeting, in the office of the Company, September 3, 1909, at 11 o'clock A.M.

The meeting was called to order by President Wilson, Secretary Elgin acting as recording officer.

All members of the Board were present.

The Secretary presented the call of the President and a copy of the notice pursuant to which the meeting was held. There being no objection, the President ordered the Call and Notice to be spread upon the Minute Book immediately following the minutes of the present meeting. (*See Forms 30, 31.*)

The President then stated that the meeting had been called to hear and act upon the report of the Committee appointed

August 27, 1909, to investigate the cost of proposed betterments to the plant of the Company.

Upon request of the President, Mr. Symington presented and explained the report of the Committee. This showed that the proposed improvements to the Company's plant could not be made for less than \$60,000, but brought facts and figures to show that this expenditure was not only justified, but was essential to the Company's continued prosperity.

Upon motion the Committee's report (*See Form 76*) was ordered received and filed and the Committee discharged with the thanks of the Board.

The Treasurer of the Company, who was present by request of the President, then submitted a report showing that some \$30,000 in surplus and undivided profits was available for the proposed improvements. He also stated that the balance required could be secured on very favorable terms.

Mr. Symington stated that the investigation conducted by the Committee had convinced him that the reduced cost and better quality of the Company's output under the improved conditions would so increase the annual profits as to enable the Company to pay the entire deferred obligation within a year from the date of the installation, a position in which he was sustained by the report of the Stockholders' Committee submitted to the Board at the preceding meeting.

After a short further discussion, the President was, by motion unanimously carried, instructed to secure bids from Messrs. Meldrum & Kinney for the alterations of the buildings and the new constructions necessary to accommodate the improved equipment, and to secure working estimates from the Miller Machine Co. of Pawtucket, Rhode Island, on the cost of the required new equipment and the expense of its installation, these bids and estimates to be ready for submission to the Board not later than the 13th day of September, 1909.

Upon motion, unanimously carried, the Board then adjourned until the 13th day of September, 1909, at 10 o'clock A. M.

HERBERT WILSON,  
President.

HENRY H. ELGIN,  
Secretary.

## CHAPTER XXVI.

### MOTIONS AND RESOLUTIONS.

---

In a meeting of either stockholders or directors, anything of minor importance, or obviously necessary, as the correction of a name or a date in the records, or the approval of the minutes of a previous meeting, might be merely directed by the president, and, if not objected to by those present, would be held to be the action of the meeting. In matters of more importance, however, or on which there is a difference of opinion, the action of the meeting must be more formally expressed and the motion or resolution is then employed.

Motions and resolutions are of the same force and both are legal and recognized methods of determining the will of an assemblage. They differ, however, in form, in the degree of their formality, and, in a general way, in the matters in which they are employed.

There is no clear-cut separation between the actions that should be taken by motion and those that are better taken by resolution, but it may be stated as a general rule that important matters should be authorized by resolution, while matters of less importance are left for motions.

The motion is the simplest method of formal corporate action. Being designed to cover matters of

the moment, motions are not as a rule submitted in writing. If, however, the subject is complex or important, or if it is desirable that exact, or a precise wording be preserved, the motion should be presented in writing, or if not so presented, the presiding officer should request the maker of the motion to reduce it to writing. The written copy is then handed to the president or to the secretary, and, if the motion is carried, is incorporated verbatim in the secretary's minutes. If the motion is not written, the secretary must exercise every care to get the sense of what is intended, and follow the wording of the maker so far as is practicable.

The following forms of motions are as they would appear in the secretary's minutes. The form of motion is the same for either stockholders' or directors' meetings. The general wording of the entry will vary with the circumstances.

**Form 40.—Motion. To Receive and File Report.**

.....  
"Upon motion duly seconded and unanimously carried, the Treasurer's Report, as read, was ordered received and filed."  
.....

**Form 41.—Motion. To Pay Bills.**

.....  
"Upon motion, duly made and seconded, and unanimously carried, the Treasurer was directed to pay the bills, as presented to the meeting, for October rent and salaries."  
.....

Usually the secretary is left to his discretion as to

whether the names of the parties making and seconding a motion are entered, or otherwise. In the foregoing motions, authorizing routine action and concurred in by all, the names are not essential. In any matters where there is a difference of opinion, or a likelihood of subsequent discussion or trouble, the names of the maker and of the party seconding a motion should be recorded. In matters of much importance the vote is frequently recorded as well.

#### Form 42.—Motion. To Pay Disputed Account.

.....  
 "Mr. William Morris moved that the account of the Shirley-Wilson Company for supplies furnished, aggregating \$235.00, be paid in full. Motion seconded by Mr. H. M. Shepherd and carried, Messrs. Morris, Shepherd and McKane voting in the affirmative and Messrs. Temple and Stanford voting in the negative."  
 .....

If, in the case of a specially complicated or important motion, the maker were requested to put it in writing, the following form would be suitable.

#### Form 43.—Motion. To Purchase Engines.

.....  
 "MOVED, That the President of this Company be hereby directed to fully investigate the claims of the Simplex Corliss Automatic Engines represented by the Willis & Vrooman Co., and, if such engines prove, in his judgment, materially more efficient—under equal conditions—than the engines now in use in the shops of this Company, that the officers of the Company shall thereupon exchange said present engines for an equal H. P. capacity of the Simplex Corliss Engines, provided that the expenditure necessitated by such exchange shall not exceed the sum of \$650.00."  
 .....

This motion should be handed the president by the maker as soon as written out, and be read by that officer to the meeting. If duly seconded, the motion would, after discussion, be put to the vote, and, if carried, the written copy be handed to the secretary for his records. The secretary should incorporate such written motion into his minutes without change of any kind, prefacing it with the proper explanatory statement, as, "The following motion, offered by Mr. Brown, was duly seconded, and carried by the unanimous vote of all present."

Resolutions are more formal than motions, usually go into their subject more fully, and are used for such important corporate actions as require a complete statement and record. Resolutions should always be submitted in writing, and should be entered in the secretary's minutes exactly as adopted. Resolutions are usually adopted by motion. Routine resolutions, such as those which immediately follow, do not require any statement of the exact vote, but are entered in the minutes, prefaced with the requisite explanatory remarks; as, for example, "Upon motion of Mr. Castleton, duly seconded by Mr. Elliott, the following resolution was unanimously adopted." (See § 88.)

.....

**Form 44.—Resolution Authorizing Contract.**  
(Directors'.)

.....

RESOLVED, That the President and Secretary of the Corwin Manufacturing Company be and hereby are authorized and directed to enter into a contract in the name of, and on behalf

of said Company with Henry J. Wilkins of the City of New York for the erection of a brick boiler house, the construction of such house to be in accordance with the plans and specifications now on file in the office of this Company, and the price and terms of payment therefor to be in accordance with the written propositions submitted by said Henry J. Wilkins.

.....

This is the proper method of authorizing the officers of the company to close a contract and to bind the corporation by its signature and seal. Form 58 shows the introductory paragraph and the closing paragraph, or testimonium, of the contract which the officers execute in pursuance of the foregoing resolution. (See § 98.)

#### Form 45.—Resolution Declaring Dividend.

(Directors'.)

.....

RESOLVED, That the sum of Two Thousand (\$2,000) Dollars be and hereby is appropriated and set aside from the surplus profits of this Company for the payment of the regular two per cent. quarterly dividend upon its outstanding stock, said dividend to be due and payable on the 10th day of August, 1909.

RESOLVED FURTHER, That the Treasurer of this Company be and hereby is authorized and instructed to notify the stockholders of such dividend and to pay the same when due.

.....

The passage of this resolution places the whole matter of the declared dividend in the hands of the treasurer. He will charge off its total amount from profits to dividend account, will send out notices of the dividend at the proper time and will prepare and deliver to the stockholders checks for the amounts due.

**Form 46.—Resolution Authorizing Sale of Assets.  
(Stockholders'.)**

.....  
WHEREAS, A certain proposition has been made by Wm. F. Gaynor and Jas. P. O'Reilly, as Trustees for the organization of the New Hampshire Granite Company, to purchase the entire plant, business and other assets of this Company, save cash in bank, for Ten Thousand (\$10,000) Dollars in cash and forty Thousand (\$40,000) Dollars par value of the stock of the said New Hampshire Granite Company; and

WHEREAS, Said proposition is approved by the stockholders of this Company:

NOW, THEREFORE, BE IT RESOLVED, That the Directors of this Company be, and hereby are, authorized, instructed and empowered to accept said proposition for the purchase of its said business and assets, and to do all things necessary to carry such acceptance into effect according to the terms of said proposition.  
.....

In most states the directors can not dispose of the entire assets of a solvent corporation save with the consent of all the stockholders. Under such conditions the preceding resolution must be adopted by the unanimous vote of the entire outstanding stock of the company if it is to be effective.

It is probable that in the negotiations that follow a certified copy of this resolution will be required. In such case the secretary's certification should state that the resolution was adopted by unanimous vote of all the outstanding stock, or an extract might be made from the minutes including the resolution and the circumstances of its adoption. If the latter method were adopted the secretary would merely certify to the correctness of the quotation from the minutes.  
(See Forms 52-54.)



## CHAPTER XXVII.

### SIGNATURES AND CERTIFICATIONS.

#### Form 47.—Official Signatures.

- .....
- |                       |                                      |
|-----------------------|--------------------------------------|
| (a) HENRY W. STANTON, | (b) HENRY W. STANTON,                |
| President.            | President American<br>Machine Works. |
- .....

Signatures such as the above where the official signing employs his own name followed by his official title, are termed official signatures. They are used in signing letters and unimportant papers which pertain to matters in charge of the particular official. The second form should be employed unless, by letter heading, subject matter, or in some other way, the company of which the signing party is an official is unmistakably indicated.

#### Form 48.—Corporate Signatures.

- .....
- (a) THE RANSOME WHEEL COMPANY,  
By.....  
President.

(b) THE RANSOME WHEEL COMPANY,  
By John M. Wells,  
President.

(c) ATTEST SEAL,  
HENRY T. WILKINS,  
Secretary.

(d) IN WITNESS WHEREOF, the said Maxwell Investment Company has hereunto caused its corporate name to be signed by its President and its corporate seal to be affixed by its Secretary, all being done in the City of New York on this 17th day of October, 1909.

{	SEAL	{	THE MAXWELL INVESTMENT COMPANY,
	CORPORATE		By James Maxwell, President.

ATTEST SEAL:  
CASPER GERMAIN,  
Secretary.

.....

The first of these forms (a) shows a partial corporate signature awaiting completion by insertion of the president's signature as shown in (b). The portion of the signature shown in (a) is usually impressed with a rubber stamp. Any other official of the company might affix the corporate signature with equal propriety, if authorized thereto, or might join with the president in such signature. The form for attestation of seal is shown in (c). In (d) is shown a formal corporate signature complete, affixed to the testimonium—or final clause—of a corporate contract. Had the secretary joined with the president in the corporate signature as in Form 58, no attestation of the seal would have been necessary. (See § 97.)

## Form 49.—Corporate Endorsements.

.....

WILLIS SILK COMPANY,  
JOHN HARRIS,  
Treasurer.

Pay to the order of the  
CHASE NATIONAL BANK,  
MONTAUK COAL COMPANY,  
JOHN ELLSWORTH,  
Cashier.

.....

The first of these is the simple corporate endorsement. The second is the form usually employed when the instrument is deposited for collection or credit. This latter endorsement is generally affixed in its entirety with a rubber stamp.

A corporation does not acknowledge signatures, or the execution of instruments, in its own name, but only through its officers. Each state has its own form for such acknowledgments. The following meets the New York requirements.

## Form 50.—Acknowledgment of Corporate Instrument.

.....

STATE OF NEW YORK, }  
County of New York, } ss.:

On the twelfth day of August, in the year 1909, before me personally came Henry Willis Crampton, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the president of the Crampton Shipbuilding Company, the corporation described in and which executed the above instrument; that he knows the seal of said

corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

HENRY WILLIS CRAMPTON.

Sworn to before me this

12th day of August, 1909.

{ NOTARIAL } HENRY SILLIMAN,  
 { SEAL } Notary Public for  
 New York County.

### Form 51.—Treasurer's Affidavit.

STATE OF NEW YORK, }  
 County of New York. } ss.:

On this 15th day of August, 1909, personally appeared before me, a Notary Public in and for the County of New York, William H. Holt, Treasurer of the Merriman Wrecking Company, who, being duly sworn, did depose and say that he has full charge and control of the books and accounts of the said Company; that the above and foregoing statement is taken from said books and accounts; that it is a true and accurate transcript therefrom, and that, to the best of his knowledge and belief, it is a just and correct presentation of the financial condition of said Company on this date.

WILLIAM H. HOLT.

Sworn to before me this

15th day of August, 1909.

{ NOTARIAL } HENRY SILLIMAN,  
 { SEAL } Notary Public for  
 New York County.

### Form 52.—Certified Resolution for Bank.

#### CERTIFIED RESOLUTION.

"RESOLVED: That the Treasurer be and hereby is authorized and instructed to open an account for the Com-

pany with the Seventh National Bank of Rochester and to deposit therein all the funds of the Company coming into his custody; such account to be in the name of the company, and funds deposited therein to be withdrawn only by check signed by the Treasurer and countersigned by the President."

---

I hereby certify that the foregoing is a true and accurate transcript of a resolution duly passed at a regular meeting of the Board of Directors of the Mallibone Manufacturing Company held in the office of said Company in Rochester, New York, at 11 o'clock A. M., on the 10th day of September, 1909, as shown by the minutes of said meeting; and that Charles Mallibone is the duly elected President of said Company and Henry Cornell is the duly elected Treasurer of said Company.

IN TESTIMONY WHEREOF, I have hereunto affixed my official signature and the corporate seal of said Company, this 10th day of September, 1909.

{ CORPORATE  
SEAL }

HENRY COMPTON,  
Secretary.

.....

The above is a good general form employed in opening the corporate bank account. In many cases the banks have their own forms for this purpose and if so these special forms will, of course, be used.

In some cases banks require also a certified transcript of any by-laws relating to the custody of funds and the duties of officers in relation thereto.

The clause certifying to the identity of the president and treasurer in the above certification is not a necessary feature of a certification but merely adds information for the bank required in the present instance.

## Form 53.—Certified Extract from Minutes.

.....  
HINCKLEY CONSTRUCTION COMPANY.TRANSCRIPT FROM MINUTES  
of

Regular Meeting of Directors held September 15, 1909.

*(Transcript from minutes appears here.)*

I, the undersigned, Secretary of the Hinckley Construction Company, do hereby certify that the above and foregoing is a true and accurate transcript from the minutes of a regular meeting of the Board of Directors of said Company held in the office of the Company on the 15th day of September, 1909, and recorded on pages 85 to 87 of the Minute Book of said Company.

Witness my hand and the seal of the Company this  
14th day of October, 1909.

{ CORPORATE  
SEAL }FRANK MCCALL,  
Secretary......  
Form 54.—Certified Extracts from Minutes. Formal.

.....  
We, the undersigned, President and Secretary respectively of the Hinckley Construction Company, do hereby certify that the above and foregoing is a true and accurate transcript from the minutes of a regular meeting of the Board of Directors of said Company held in the office of the Company on the 15th day of September, 1909, and recorded on pages 85 to 87 of the Minute Book of said Company.

IN WITNESS WHEREOF, we have hereunto affixed our official signatures and the seal of the Company in the City of Saratoga, State of New York, on this 14th day of October, 1909.

{ CORPORATE  
SEAL }HAMILTON HINCKLEY,  
President.  
FRANK MCCALL,  
Secretary.

# CHAPTER XXVIII.

## CHECKS, NOTES AND CONTRACTS.

### Form 55.—Corporate Check.

Marchmont Corporation, 302 Broadway, New York.	No. 1338.	New York, September 20, 1909.
	SEABOARD NATIONAL BANK.	
	18 Broadway.	
	Pay to the order of Arthur Colville.....\$500.00.	
	Five Hundred ..... <sup>00</sup> / <sub>100</sub> Dollars.	
	WILLIS ALCOTT, President.	MARCHMONT CORPORATION. By STEPHEN CALVERT, Treasurer.

Checks are made out in a variety of forms. The above form is much used. Occasionally the draft form is employed, the name of the company appearing in the place occupied by the bank's name in the foregoing check form, and the name and address of the bank appearing in the left lower corner. The arrangement has merits from an advertising standpoint. If a check has the name of the company plainly appearing upon it, the simple official signatures of the officers authorized to sign, as given in Form 47 (a), are much used, though it is perhaps better that the corporate signature should appear. Any signature recognized by the bank is, however, sufficient.

**Form 56.—Corporate Note. Signature by President.**

\$1,000.00.

New York, August 16, 1909.

Sixty days after date the Ogden Wrecking Company promises to pay to the order of Henry Adams the sum of One Thousand dollars.

OGDEN WRECKING COMPANY,

By HENRY OGDEN,

President.

The foregoing gives the proper form of signature for a corporate note. If the foregoing note were merely signed with the president's official signature,—

"HENRY OGDEN,

President of the

OGDEN WRECKING COMPANY."

the person so signing might make himself personally liable and might also invalidate the note as against the corporation.

**Form 57.—Corporate Note. Signature by Treasurer.**

\$1,500.00.

Newark, New Jersey, October 1, 1909.

Three months after date the Harwood Manufacturing Company promises to pay to the order of Howard McCormick the sum of Fifteen Hundred Dollars, with interest from date until paid, at the rate of Five Per Cent. per annum.

Value received.

THE HARWOOD MANUFACTURING COMPANY,

By JAMES H. HALSEY,

Treasurer.

Payable at the

SEABOARD NATIONAL BANK

of New York City.

A corporate note does not require to be sealed. It may be signed by any officer or officers properly auth-



orized thereto. For notes given in the regular routine of business, this authority would usually be conferred upon the proper officials by the by-laws or by custom. For large amounts, or for special transactions outside the usual routine, this authorization would be given by resolution or motion of the board of directors.

### Form 58.—Corporate Contract.

.....

#### CONTRACT.

THIS AGREEMENT, made and entered into this 23rd day of September, 1909, by and between the Corwin Manufacturing Company, a corporation duly organized and existing under the laws of the State of New York, party of the first part, and Henry J. Wilkins, of the City and State of New York, party of the second part:

WITNESSETH:

That in consideration of the, etc.

*(Here would be inserted the consideration, specifications and terms.)*

IN WITNESS WHEREOF, the said Corwin Manufacturing Company, party of the first part, has caused its corporate seal to be hereunto affixed and its corporate signature to be subscribed hereunto by its President and Secretary, and the said Henry J. Wilkins, party of the second part, has hereunto affixed his signature and seal, all being done in the City and State of New York on the day and year first above written.

CORWIN MANUFACTURING COMPANY,

{ CORPORATE }  
{ SEAL }

By WILSON M. BROWN,  
President.

HARVEY B. SMALL,  
Secretary.

In presence of: HENRY J. WILKINS. [L. S.]

MANLY F. CLARK.

ALBERT PARSONS.

When the secretary joins in the company signature as in the foregoing form, he need not attest the seal. If, however, he does not join in the company signature, the corporate seal should be attested by his signature and the formal corporate signature affixed to the foregoing testimonium would then appear as in Form 48.

Where the contract or other instrument is to be acknowledged for record in some particular state, the form of acknowledgment used in that particular state should be employed, or, in the case of real estate, the form used in the state in which the real estate is situated. (See Form 44 for resolution authorizing this contract.)

#### Form 59.—Assignment of Contract.

.....

##### ASSIGNMENT.

##### KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the payment by the Allegheny Coal Company, a corporation duly organized under the laws of the State of West Virginia and having its principal office and place of business at 275 Main Street, Cornwallis, West Virginia, of Seven Thousand Two Hundred and Forty-seven (\$7,247.00) Dollars to the Consumers Coal Company, a corporation duly organized under the laws of the State of New York, and having its principal office and place of business at 54 Broadway, New York City, the receipt of which payment is by the last-named corporation hereby acknowledged, said Consumers Coal Company does hereby assign, transfer and convey to the said Allegheny Coal Company, all and singular, its right, title and interest of every kind in and to a certain contract, copy of which is hereunto annexed and made part of this instrument, entered into on the 13th day of August, 1909, between the Empire Steam & Power Company of New York City

and the said Consumers Coal Company, for the delivery to said Empire Steam & Power Company of Forty-five Thousand (45,000) Tons of bituminous coal, at the price and of the grade and upon the terms set forth in said contract, which said contract is hereby conveyed to and accepted by the said Allegheny Coal Company subject to all the terms and conditions therein set forth, and it is a further condition of this assignment that the said Consumers Coal Company shall be free from any claim, liability or other obligation for, on account of, or by reason of said contract.

IN WITNESS WHEREOF, the said Consumers Coal Company has hereunto caused its corporate name and seal to be affixed by its President and Secretary, all being done in the City of New York on this 13th day of August, 1909.

{ CORPORATE }  
{ SEAL }

CONSUMERS COAL COMPANY,

By CHARLES STEVENSON,  
President.

WILLIAM CROSBY,  
Secretary.

## CHAPTER XXIX.

### THE CORPORATE RECORDS.

---

The stock ledger on opposite page combines in compact form all the requisites of the stock ledger with all the statutory requirements of most of the states as to the stock book.

The leaves of the book are indexed to secure the necessary alphabetical arrangement, and the name and residence of the stockholder appear at the head of the account as in the ordinary ledger. On the right-hand side of the account the party is credited with the stock he purchases or otherwise acquires, and on the left-hand side is debited with any stock disposed of. The difference between the two sides shows at any time the amount of stock standing to his credit.

On the debit or sales side of the account, the first column gives the date of the transaction, the second the name of the party to whom the stock is transferred, the third the number of the surrendered certificate, the fourth the number of the certificate reissued to the transferrer, in case but a portion of the stock represented by the surrendered certificate is sold, and the fifth column the number of shares disposed of.

## Form 60.—Stock Ledger.

WILLIS ODELL, NEW HAVEN, CONN.

DATE	TO WHOM TRANSFERRED	CERTIFICATE NUMBERS		NUM- BER OF SHRS.	DATE	FROM WHOM TRANSFERRED	AMOUNT PAID THEREON	NUM- BER OF NEW CER- TIFI- CATE	NUM- BER OF SHRS.
		SURREN- DERED	RE- ISSUED						
1909					1909				
Mar. 13	M. K. Hoyt.....	28	75	10	Jan. 10	Original Issue.....	Full paid	28	50
Mar. 15	Louis Smith.....	75	84	10	Mar. 25	Robert Parker.....	"	112	80
May 31	Balance.....			130	May 12	George Breaker.....	"	191	20
				150					150
					JUNE 1				130

On the credit side, the first column gives the date of purchase, the second the name of the party assigning the purchased stock, the third the character of the stock, whether full-paid or but part-paid, and if but part-paid the amount paid to the company thereon, the fourth column the numbers of the certificates issued to the party, and the last the number of shares acquired. (See §§ 46, 91.)

### Form 61.—Transfer Book.

.....  
 Ledger Folio 25.

Transfer No. 725.

#### THE HASWELL PAPER PULP COMPANY.

For Value Received, I hereby sell, assign and transfer to Harvey Woodville, of Brooklyn, New York, Fifteen (15) Shares of the Capital Stock of the above-mentioned Company now standing in my name on the Company books and represented by surrendered Certificates, Nos. 32 and 153.

Witness my hand and seal this 12th day of July, 1909,  
 at Jersey City, New Jersey.

EDWARD SERRELL, [L. S.]

By HOLMES B. DESBROW,

New Certificates Nos. 325, 326.

Attorney.

Issued to Harvey Woodville.

Ledger Folio 75.  
 .....

The secretary or transfer agent usually acts as attorney for the person selling the stock, and fills out and signs the transfer as shown above. The data relating to the issue of the new certificate is no part of the transfer proper, being merely a memorandum for the convenience of the secretary when making the entry of the transfer in his stock book. (See §§ 46, 90.)

## Form 62.—Transfer Book. Condensed Form.

## TRANSFER BOOK.

We, the transferrers hereunder, owners of record of the Capital Stock of the Thompson Desk Company represented by the surrendered certificates entered below, do by attorney undersigned, hereby respectively sell, assign and transfer to the transferees indicated, the number of shares of stock of said Company set opposite our respective names, all as set forth below.

DATE	CERTIFICATES SURRENDERED		TRANSFERRED.	LEDGER FOLIO	CERTIFICATES ISSUED		TRANSFEREE.	LEDGER FOLIO	ADDRESS.	SIGNATURE OF ATTORNEY
	NUMBERS	SHARES			NUMBERS	SHARES				
1909										
Oct. 1	175	50	Henry H. Barrett..	48	862	50	George A. Daley	150	170 Broadway, N. Y.....	Willis K. Barnes
	365	75	Farrell T. Smythe	400	{ 863 864	50 25	Oscar Hamilton..	170	Bound Brook, N. J.....	Willis K. Barnes
2							H. T. Maxwell...	162	185 West End Ave., N. Y.	Willis K. Barnes

The transfer book is usually closed to transfers from ten to twenty days before the annual meeting, as may be prescribed by the by-laws. During this period no transfers of stock will be entered on any of the books of the corporation.

Another form of transfer book used by the larger corporations is given in Form 62. This shows the upper portion of the page. The blanket assignment at top enables the record of each transfer to be made on a single line. The convenience of the form where transfers are frequent is obvious.

In the entries shown the second transferrer has surrendered a single certificate for seventy-five shares to be issued to two different parties, and two partial entries are therefore necessary.

#### Form 63.—Dividend Book.

##### DIVIDEND BOOK.

Dividend No. 5 of 2%. Declared Nov. 1, 1909. Payable Dec. 15, 1909, to Stockholders who appear of Record Dec. 1, 1909.

STOCKHOLDER'S NAME	SHARES	AMOUNT	PAID	RECEIVED BY
Alsop, John H.....	50	\$100.00	Dec. 18	John H. Alsop.
Barrington, Harvey	25	50.00	Dec. 15	Howard Jones, Atty.

The dividend book is employed when stockholders are required to call in person and receive and receipt for dividends. Each dividend as declared is entered



in detail, occupying one or more pages, as may be necessary. A statement of the facts appears at the head of each page of the particular record. The form as presented is simple and its method is obvious. Stockholders' names are arranged alphabetically, and the signatures appearing in the last column serve as a receipt for the dividend payment. A signature by an attorney, as in the second example, is not sufficient unless authorized by due power of attorney filed with the treasurer of the company.

## CHAPTER XXX.

### NOTICES.

---

Subscriptions are frequently made payable in instalments, either at fixed dates, or subject to call. When payable at fixed dates, notice of each instalment when due is sent out by the treasurer. When subject to call, action of the board is necessary before the instalment is due. The following notice is of an assessment made by the board.

#### Form 64.—Instalment Notice.

.....

##### INSTALMENT NOTICE.

---

YOUUMAN COPPER COMPANY.

635 State St., Boston, Mass.

---

MR. JOHN H. MALLARD,  
225 Mill Street,  
Lowell, Mass.

DEAR SIR,—You are hereby notified that by due resolution of the Board of Directors, the second instalment of Fifteen (15%) Per Cent. on subscriptions to the stock of the Youman Copper Company has been called for, the amount thereof to be paid to

the Treasurer of the Company on or before the 10th day of October, 1909.

Boston, Mass.,  
October 1st, 1909.

WALFORD H. McMASTERS,  
Treasurer.

Shares Subscribed, 35.  
Amount of Assessment, \$525.

---

Draw Checks Payable to Treasurer.

.....

In the smaller corporations dividend notices are usually sent by mail but are not published. In the larger corporations they are almost invariably published and are usually sent by mail as well.

The following is a common form of mailing notice. It may easily be modified for publication purposes by omitting the complimentary address and changing the introductory words to read: "Notice is hereby given."

#### Form 65.—Dividend Notice. Mailing.

.....

MILL SUPPLY COMPANY.

646 Broadway, New York.

---

September 1, 1909.

DEAR SIR,—You are hereby notified that the Directors of the Mill Supply Company have this day declared the regular semi-annual dividend of Four (4%) Per Cent. on the Capital Stock of the Company, payable October 1, 1909, to stockholders who appear of record at the close of business September 15, 1909.

FRANK T. SCHWARTZ,  
Treasurer.

If, as is usually the case with the larger corporations, the transfer books are closed preparatory to payment of dividends, the dates of closing and reopening should appear as in the following notice, which may be used either for publication or for mailing.

**Form 66.—Dividend Notice. Publication.**

.....  
SUSQUEHANNA COAL COMPANY.

New York, October 1, 1909.

DIVIDEND No. 40.

The Directors of the Susquehanna Coal Company have this day declared a quarterly dividend of One and One-half (1½%) Per Cent. on the Capital Stock of the Company, payable October 30, 1909, to stockholders of record at the close of business October 10, 1909.

Transfer books will close October 10, 1909, and reopen October 19, 1909. Checks will be mailed.

SAMUEL T. HINCKLE,  
Treasurer.

.....  
When a corporate election is held it is the duty of the secretary to notify the officers-elect. The following is a common form of notification:

**Form 67.—Notice of Election as Director.**

.....  
TRENTON POTTERIES COMPANY.

Trenton, New Jersey.

September 10, 1909.

MR. WILLIS T. SMALLEY,  
742 Riverside Ave.,  
Trenton, New Jersey.

DEAR SIR,—You are hereby notified that at the annual meeting of the Trenton Potteries Company held this day, you were elected a member of its Board of Directors.

The next regular meeting of the Board will be held in the office of the Company September 15, 1909, at 3 o'clock P. M., for the election of officers and for the transaction of such other business as may come before the meeting.

You are requested to be present and participate in this meeting.

Respectfully,

FRANK SCHWINGLE,  
Secretary.

.....

As a rule, when a director is to be elected, those interested ascertain in advance that the proposed candidate will serve if elected. In such case the notification given above is all-sufficient. If, however, there is any doubt, the notification should request the director-elect to indicate his acceptance, as in the following form:

**Form 68.—Notice of Election as Director. Acceptance Requested.**

.....

PENN MACHINE WORKS.  
763 Chestnut Street,  
Philadelphia, Pennsylvania.

October 1, 1909.

MR. JOHN T. FRENCH,  
936 Walnut St.,  
Philadelphia, Pa.

DEAR SIR,—At a meeting of the Directors of the Penn Machine Company held this day, you were elected a member of the Board to fill the vacancy caused by the resignation of Mr. Henry Simonson. Will you kindly indicate your acceptance of the position at your early convenience.

Respectfully,

GEORGE H. WRIGHT,  
Secretary.

CHAPTER XXXI.

SUNDRY CORPORATE FORMS.

BALLOTS.

Form 69.—Ballot. Annual Meeting.

.....

BALLOT.

HARRIS DROP-FORGE COMPANY.

Annual Meeting, August 10, 1909.

I, the undersigned, hereby vote 35 shares of stock for the following named persons to serve as Directors for the ensuing year:

Frank T. Harris.  
John J. Wilson.  
Nelson Brown.

H. Thomas Parkes.  
Henry Sterling.

*Signature,*

FRANCIS McCOMB,  
Proxy for JOHN MCCALLUM.

.....

When a ballot is cast by a proxy, the form of signature should include both the name of the proxy and of the party for whom he is acting and indicate the capacity in which the proxy acts. As no question of personal responsibility enters in, the proxy may, on behalf of his principal, affix his own signature, as in

the foregoing example, or may, as proxy, sign his principal's name thus,—

“JOHN MCCALLUM,  
By FRANCIS MCCOMB,  
Proxy.”

If cumulative voting is used, a different form of ballot is necessary. The following meets the requirements:

### Form 6ga.—Ballot. Cumulative Voting.

.....  
BALLOT.  
\_\_\_\_\_

#### METALS-ALLOY COMPANY.

\_\_\_\_\_

Annual Meeting, January 12, 1909.  
\_\_\_\_\_

I, the undersigned, hereby vote for the following named persons to serve as Directors for the ensuing year, casting for each the number of votes set opposite his name:

NAME.	VOTES CAST.
John J. Niles.....	125
Frank Berrian.....	125

*Signature,*

HOWARD S. BENJAMIN.

Number of Shares Owned.... 50

Number of Votes Cast.....250

.....

(See §§ 112, 135.)

### RESIGNATIONS.

It is obvious that an elective officer can not be forced to retain his position against his will. Hence a director or other officer of a corporation may resign at any time.

A resignation may be so phrased as to be immediately effective without acceptance, or otherwise may be worded so as to be ineffective until accepted by the board of directors. The following resignation is of this tentative nature, requiring acceptance before the official tenure of the party submitting it is terminated.

**Form 70.—Resignation of Director.**

.....  
TO THE BOARD OF DIRECTORS OF THE  
KRON MANUFACTURING COMPANY.

GENTLEMEN,—On account of continued ill health, which prevents my attention to the duties of the position, I hereby tender my resignation as a Director of the Kron Manufacturing Company.

Very Respectfully,

ROBERT H. MCPHERSON.

New York City,  
September 15, 1909.  
.....

A tender of resignation such as the foregoing holds good until it is accepted, or until it is withdrawn, or until the party's official term expires. If the resignation is accepted, the whole matter is thereby closed, but at any time prior thereto the party filing the resignation has a right to withdraw it or revoke it, and its acceptance thereafter by the board would be of no effect. Also if the party's official term expires, the resignation is thereby voided and if he is again elected the old resignation, even though still on file, is of no effect.



It is to be noted that a tentative resignation such as the foregoing, if accepted without qualification is immediate in its effect, the official position of the party signing the same terminating at the moment the resolution or motion of acceptance is adopted. If the party is present at the meeting and it is desirable to avoid this abrupt termination of his official status, the acceptance may be phrased, "to take effect at the close of the present meeting."

A resignation may be made effective at some future date and its prior acceptance can not in any way hasten this date, though it effectually prevents the withdrawal or revocation of the resignation thereafter. It should be remembered that the board can only fill vacancies. Hence, even though a resignation effective at some future date is accepted, a successor to the resigning director can not be elected until the vacancy actually exists. Under no circumstances can the retiring director vote for his own successor.

The following resignation is peremptory and effective as soon as handed to the secretary of the company. No action of the board is required, nor can the board in any way prevent its effect. The peremptory form of resignation is often employed when a director or other official wishes to express his disapproval of, or escape responsibility for some proposed corporate action. It does not relieve the resigning official from any responsibility for past actions, but does relieve him from responsibility for anything undertaken thereafter.

## Form 71.—Resignation of President.

.....

TO THE BOARD OF DIRECTORS OF THE  
WESTERN ELECTRIC COMPANY.

GENTLEMEN,—I hereby resign my position as President and a Director of the Western Electric Company, my resignation to take immediate effect.

Respectfully,

JAMES H. WALWORTH.

Chicago, Illinois,  
September 10, 1909.

.....

## MISCELLANEOUS INSTRUMENTS.

It would seem preferable that all receipts for money received by a corporation should be given in the corporate name. In practice, however, corporate receipts are commonly signed by the treasurer. In such case the name of the corporation should appear prominently upon the instrument in order to indicate its corporate character.

## Form 72.—Corporate Receipt.

.....

WEBSTER PRINTING Co.,  
325 Cedar St. N. Y.

\$250.00.

NEW YORK, July 15, 1909.

Received from Edward M. Bogart Two Hundred and Fifty Dollars, rental of Store at No. 65 Vesey St. for September.

WEBSTER PRINTING COMPANY,  
By SAMUEL F. WATKINS,  
Treasurer.

.....

## Form 73.—Corporate Bill of Sale.

## BILL OF SALE.

## KNOW ALL MEN BY THESE PRESENTS:

That the Howard Printing Company, a corporation duly organized under the laws of the State of New York, with its principal office and place of business at No. 69 Murray Street, in the City of New York, in consideration of the sum of Fifteen Hundred (\$1500.00) Dollars to it paid by John C. Ralston of New York City, the receipt whereof is hereby acknowledged, does hereby sell, transfer and assign to the said Ralston the following goods and chattels, viz.:

The printing machinery, apparatus, type, type cases, stands and stock now in the premises at No. 69 Murray Street, New York City, occupied by the Howard Printing Company, all as set forth and specified in the annexed schedule; to have and to hold, all and singular, the said goods and chattels to the said Ralston, his successors and assigns, to their own use and behoof forever; and the said Howard Printing Company does hereby covenant with the said Ralston, grantee hereunder, that the said Howard Printing Company is the lawful owner of said goods and chattels; that they are free from all liens; that it has a good right to sell the same as aforesaid; and that it will warrant and defend the same against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, the said Howard Printing Company has caused its corporate name to be signed hereunto by its President and its corporate seal to be affixed and duly attested by its Secretary, said corporate seal being affixed both to these presents and to the schedule hereunto annexed, all being done in the City of New York on this 5th day of October, 1909.

{ CORPORATE  
SEAL }

HOWARD PRINTING COMPANY,  
By FRANCIS T. HOWARD,  
President.

ATTEST SEAL:

JOHN H. STERLING,  
Secretary.

The treasurer's bond was formerly a personal one, signed by the treasurer and his friends. Of recent years, however, companies have been formed for bonding purposes, and these surety company bonds have largely superseded the personal bond. The forms for surety company bonds are supplied by the surety companies and are too lengthy for inclusion in the present volume. A common form of personal bond is as follows:

**Form 74.—Bond. Treasurer's.**

.....  
**TREASURER'S BOND.**  

---

**KNOW ALL MEN BY THESE PRESENTS:**

That we, Frank A. Pennington of Binghamton, New York, as principal, and John H. Seward and Samuel T. Williams, both also of Binghamton, as sureties, are held and firmly bound unto the Binghamton Creamery Company, a corporation duly organized under the laws of the State of New York, in the sum of Ten Thousand (\$10,000) Dollars, to the payment of which to the said corporation, its successors or assigns, we do by these presents jointly and severally bind ourselves, our heirs, executors and administrators.

Signed and sealed this 25th day of August, 1909.

The condition of the above obligation is that:

WHEREAS, The said Frank A. Pennington has been elected treasurer of the said Binghamton Creamery Company for the period of one year from the 20th day of August, 1909, and may hereafter be re-elected to or continue in such office for a further period:

Now, THEREFORE, If the said Frank A. Pennington shall hereafter in all respects fully, faithfully and honestly perform and discharge the duties of said office so long as he shall continue therein, both during the term for which he has been elected and during such further time as he may continue therein,

whether by re-election or otherwise, and shall when properly so required, fully and faithfully account to the said corporation, its successors or assigns, for all moneys, goods and properties whatsoever, for or with which the said Frank A. Pennington may in anywise be accountable or beholden to the said corporation, and if at the expiration of his term of or continuance in office, or prior thereto in the event of his death, resignation or removal from office, all books, papers, vouchers, money and other property whatsoever placed in his custody as Treasurer of said corporation shall be forthwith restored to the said corporation, its successors or assigns, then this obligation shall be void; but otherwise to remain in full force and effect.

FRANK A. PENNINGTON. [L. s.]

JOHN H. SEWARD. [L. s.]

SAMUEL T. WILLIAMS. [L. s.]

Signed, Sealed and Delivered  
in the Presence of:

THOMAS HACKETT.

GORDON F. WILSON.

.....

The treasurer's bond must be given under seal, and, while not legally necessary, personal bonds are usually acknowledged.

When a stock certificate is lost or destroyed, a bond of indemnity is usually required before the corporate authorities will replace the lost certificate. The following form is employed for this purpose:

### Form 75.—Bond. Lost Stock Certificate.

.....

#### INDEMNITY BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, Harry L. Lord of Yonkers, New York, as principal, and Thomas Frenkel and James P. Elder of New York City,

as sureties, are held and firmly bound unto the Yonkers Hardware Company, a corporation duly organized under the laws of the State of New York, in the sum of Two Thousand (\$2,000) Dollars, to the payment of which to the said corporation, its successors or assigns we do by these presents jointly and severally bind ourselves, our heirs, executors and administrators.

Signed and sealed this 2nd day of October, 1909.

The condition of the foregoing obligation is that:

WHEREAS, The said Harry L. Lord is the owner of record, as shown by the stock book of the corporation, of Twenty (20) Shares of the Common Capital Stock of the said Yonkers Hardware Company, each of the par value of One Hundred (\$100) Dollars, the ownership of said stock being further evidenced by Certificate No. 482 issued in the name of the said Harry L. Lord on the 1st day of September, 1908; and

WHEREAS, The said Harry L. Lord has made application to the Board of Directors of the Yonkers Hardware Company for the issue in his name of a new certificate for the said Twenty (20) Shares of stock of the said Company, alleging that original Certificate No. 482 is lost, stolen or destroyed, and that its present whereabouts and condition are unknown to him; and

WHEREAS, By due and formal resolution of the said Board of Directors, said application has been granted and a new certificate for said Twenty (20) Shares of the stock of the said Yonkers Hardware Company has this day been issued to the said Harry L. Lord:

Now, THEREFORE, If the said Harry L. Lord, his heirs, executors and administrators, or any of them, do and shall at all times hereafter, save, defend and indemnify the said Yonkers Hardware Company, its legal successors or assigns, of, from and against all demands, claims or causes of action arising from or on account of the loss of said Certificate No. 482 for Twenty (20) Shares of the Common Capital Stock of said Company, and the issue of said new certificate in place thereof, and of and from all costs, damages and expenses that shall or may arise because of said reissue, and shall also deliver or cause to be delivered up to the said Yonkers Hardware Company for cancellation the said missing Certificate No. 482 whenever and so soon as the same shall be found or recovered, or come into his

possession, then this obligation shall be void; otherwise to remain in full force and effect.

HARRY L. LORD. [L. S.]

THOMAS FRENKEL. [L. S.]

JAMES P. ELDER. [L. S.]

Signed, sealed and delivered  
in the presence of:

EDGAR WALTERS.

LEONARD HOLCOMB.

(See § 45.)

### Form 76.—Committee Report.

TO THE BOARD OF DIRECTORS

OF THE ELLENVILLE WOOLEN MILLS CO.

GENTLEMEN:

Your committee appointed to investigate the cost of the proposed betterments of the Company's equipment and general plant begs leave to report as follows:

First. Your Committee finds that the present machinery and apparatus used in the mills of the Company is in thoroughly good condition, but that since its introduction better methods requiring apparatus of special design have been introduced, the difference being so radical that but little, if any, of the present installation can be retained.

Second. The cost of the proposed betterments will exceed the estimates of the stockholders' report submitted at a preceding meeting of the Board, aggregating not less than \$60,000. This larger cost is due to the radical nature of the improvements required, which necessitate material alterations and additions to the present buildings.

Third. Your Committee has gone a step beyond the immediate purposes of its appointment, having undertaken a general investigation of the conditions confronting the Company. We find, through this investigation, that the output of the Ellenville Mills

is higher in cost and lower in quality than the output of similar mills better equipped, and this in the face of natural facilities that give the Ellenville Mills material advantages over these competitors.

In conclusion your Committee would strongly recommend the speedy introduction of the better equipment contemplated, not only as a matter of policy, but of necessity, as a continuance of the present conditions is likely to seriously and permanently injure the reputation and the prosperity of the Ellenville Mills. On the other hand the installation of the proposed improved equipment will not only maintain the business of the Company on the same satisfactory basis as heretofore, but will unquestionably result in materially increased profits.

Respectfully submitted,

WILLIAM S. SYMINGTON.

HERBERT WILSON.

Ellenville, New York,  
September 3, 1909.

.....  
(See Form 39.)



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## XVII

### THE JUDICIAL SYSTEM

#### 1. The Development of Judicial Institutions in South Africa

WE saw in the first chapter that the East India Company was founded by a charter granted by the states-general in 1602. This charter made provision for the establishment of courts of justice. At the Cape a court was established called the *Raad van Justitie*. Its judgments and sentences were pronounced in the name of the states-general and the Prince of Orange, and not in the name of the East India Company. The full court, which consisted at different times of from seven to thirteen members, had plenary jurisdiction in all civil and criminal matters. Its seat was at Capetown. It was the court of appeal for all the inferior and district courts in criminal as well as civil matters. From the *Raad van Justitie* an appeal lay to the supreme court at Batavia.

In 1682 a court of first instance for petty cases was created for Capetown and the Cape district, and courts of landdrost and heemraden were established in two districts adjoining the Cape district.<sup>1</sup> The landdrost was a kind of magistrate presiding over a board of burghers called heemraden. In 1805 five magistracies or *drosdyen* were established. The jurisdiction of the landdrosts was limited by statute. Under the landdrost stood the field-cornet. The landdrost occupied a judicial position only in civil cases; in criminal cases of a serious nature they acted as prosecutors, and sent the cases to Capetown for trial. From any judgment of a landdrost an appeal lay to the court of justice at Capetown.

The whole of the civil administration of the district was entrusted to the board of landdrost and heemraden. They caused roads to be made, supervised prisons and all other public buildings, and collected the taxes.

Until 1813 all the proceedings of the courts were not conducted in public. In 1814 the Dutch possessions in South

<sup>1</sup> J. W. Wessels, *History of the Roman-Dutch Law* (Grahamstown, 1908), p. 152.



Africa were formally ceded to Great Britain. The British government recognized the judicial institutions then existing, and left the people to be governed by the system of law to which they had grown accustomed. Gradually, however, statutory alterations were made in the legal system and the legal institutions of the colony. During the first occupation the governor had constituted himself a court of appeal for civil cases, with an appeal from his decision to the privy council. A year later, in 1808, the governor and two assessors became a court of appeal in criminal cases. In 1811 circuit courts were first established. In 1819 some of the provisions of English criminal practice were introduced.

In 1826 an ordinance was promulgated creating justices of the peace. From 1814 the Dutch and English languages had been used in judicial proceedings, but in 1827 all judicial acts and proceedings were required to be conducted in the English language. In 1828 the important office of registrar of deeds was created. In 1830 the law of evidence was altered in such a way that English rules of evidence added to the jury system which had been introduced in 1827 made the Cape courts almost a replica of English courts.

With the Charter of Justice of 1827 the *Raad van Justitie* passed away, and was replaced by a supreme court of three judges appointed by the crown for life. The landdrosts and heemraden also disappeared and their functions were taken over by resident magistrates and civil commissioners. The supreme court established in 1827 continued with but little alteration until the South Africa Act merged it in the supreme court of South Africa. The New Charter of Justice of 1832 repealed and re-enacted the Charter of Justice of 1827, amplifying it in regard to matters of detail.

The Dutch courts recognized two classes of legal practitioners, the attorney and the advocate. As these practitioners were also known to the English practice, there was no difference in this respect after the establishment of the supreme court.

In 1864 an Eastern Districts' court was established, and in 1879 a high court of Griqualand West. Each consisted of a judge-president and two puisne judges. The jurisdiction of the above courts will be discussed in the next section of this chapter.

The supreme court of Natal and the Natal judicial system were modelled on the British and Cape systems. Roman-Dutch

law was introduced in 1845 and a Code of Native Law recognized in 1849. The laws governing the constitution and jurisdiction of the Natal supreme court were codified in 1896.

A superior court in the Transvaal was established by the Grondwet of 1858 and consisted of three landdrosts and twelve jurymen. In 1877 a law was passed amending the Grondwet and constituting a high court of three judges and circuit courts. The high court thus constituted was also modelled upon the supreme court of Cape Colony. After the annexation the constitution of the superior court was regulated by a statute of 1903; the supreme court sitting at Pretoria consisted of seven judges, and the high court of the Witwatersrand, which was the court of a single judge, presided over by one of the judges of the supreme court, was a local division of the supreme court.

In the Orange Free State the Cape model was closely followed; the statute of 1902 created a high court of three judges.

The procedure of the superior courts of each colony, including Southern Rhodesia, was regulated by a set of rules published for each particular court, but these rules were all so similar to the rules of the supreme court of the Cape of Good Hope that the difference in judicial procedure of the various courts was very slight. These rules still form the basis of the procedure in the different divisions of the supreme court of South Africa.

After the war of 1900 all the inferior courts in South Africa were known as resident magistrate courts. The magistrates throughout the Union still have administrative duties which can be traced down from the duties which were imposed upon the early landdrosts at the Cape.

## 2. Judicial Institutions at the Time of Union

Immediately before the establishment of the Union, the administration of justice in each colony, as we have seen, was divided between a supreme court and the magistrates' courts. Within the limits of the colony each supreme court had full jurisdiction, subject to a limited right of appeal to the privy council. The Cape supreme court had appellate jurisdiction over the high court of Southern Rhodesia. Each of the supreme courts had original jurisdiction in civil suits, and criminal cases were tried by a judge and jury. In each supreme court, three judges heard appeals from the decisions of a single judge, and two

judges heard appeals from a magistrate's decision. All the courts were creations of statute, and there were no customary courts as there are in England. Nevertheless the superior courts have always claimed an inherent jurisdiction to provide substantial justice in matters not precisely defined or embraced in the statutes creating these courts.

The magistrates' courts had jurisdiction in the areas of the magisterial districts for which they were created, but their jurisdiction was limited in civil matters in respect of the amount of the claim and the nature of the suit, and in criminal cases in respect of the punishment and the nature of the crime.

*The Supreme Court of the Cape of Good Hope* had jurisdiction over the whole of the colony. It sat at Capetown, and consisted of a chief justice, with two judges permanently assigned to the court, and other judges sitting in it from time to time as occasion might require. There were two other courts in the Cape which were in the nature of local divisions of the Cape supreme court. Their judges were judges of the Cape supreme court, entitled to sit and take part in the proceedings of the supreme court at Capetown. These courts were known as the *Court of the Eastern Districts of the Cape of Good Hope*, sitting at Grahamstown, and the *High Court of Griqualand West*, sitting at Kimberley. Each consisted of a judge-president and two puisne judges. Within their respective territorial areas of jurisdiction they had concurrent jurisdiction, i.e. both an original jurisdiction and an appellate jurisdiction from the decisions of magistrates, with the supreme court of the Cape of Good Hope: but from the decisions of these two local courts an appeal lay to the supreme court at Capetown. *The Supreme Court of the Transvaal* sat at Pretoria and had jurisdiction over the whole of the Transvaal. A local division of this Court, known as the *Witwatersrand High Court*, sat at Johannesburg, and, except that it had no appellate jurisdiction at all, its powers within its area of jurisdiction were almost equal to those of the Transvaal supreme court. *The Supreme Court of Natal* sat at Maritzburg, and the *High Court of the Orange River Colony* sat at Bloemfontein.

### 3. The Superior Courts of the Union

The South Africa Act created one supreme court for the whole of the Union:

95. There shall be a Supreme Court of South Africa consisting of a Chief Justice of South Africa, the judges<sup>1</sup> of appeal, and the other judges of the several divisions of the Supreme Court of South Africa in the provinces.

96. There shall be an appellate division of the Supreme Court of South Africa consisting of the Chief Justice of South Africa and four judges of appeal.<sup>2</sup>

98. (1) The several supreme courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony shall, on the establishment of the Union, become provincial divisions of the Supreme Court of South Africa within their respective provinces, and shall each be presided over by a judge-president.

(2) The court of the eastern districts of the Cape of Good Hope, the High Court of Griqualand, the High Court of Witwatersrand, and the several circuit courts, shall become local divisions of the Supreme Court of South Africa within the respective areas of their jurisdiction as existing at the establishment of the Union.

(3) The said provincial and local divisions, referred to in this act as superior courts, shall, in addition to any original jurisdiction exercised by the corresponding courts of the Colonies at the establishment of the Union, have jurisdiction in all matters—

(a) in which the Government of the Union or a person suing or being sued on behalf of such government is a party;

(b) in which the validity of any provincial ordinance shall come into question.

(4) Unless and until Parliament shall otherwise provide, the said superior courts shall *mutatis mutandis* have the same jurisdiction in matters affecting the validity of elections of members of the House of Assembly and provincial councils as the corresponding courts of the Colonies have at the establishment of the Union in regard to Parliamentary elections in such Colonies respectively.

It thus appears that after the establishment of the Union, all that was changed was the nomenclature of the several superior courts, and an appellate division for hearing appeals from those courts was created. Except for an increased jurisdiction to deal with matters that would arise from the fact of the establishment of one government for the Union and of provincial councils, the jurisdiction of the superior courts remained the same.

The following table shows the various divisions of the supreme court in comparison with the superior courts of the former colonies:

<sup>1</sup> As amended by section 2 (1) (a) of Act No. 12 of 1920.

<sup>2</sup> As substituted by section 1 of Act No. 12 of 1920.

THE SUPREME COURT OF SOUTH AFRICA		CORRESPONDING COLONIAL COURTS	
APPELLATE DIVISION	*Cape of Good Hope Provincial Division	*Supreme Court of the Cape of Good Hope	
	Eastern Districts Local Division	Eastern Districts Court	
	Griqualand West Local Division	High Court of Griqualand West	
	*Transvaal Provincial Division	*Supreme Court of the Transvaal	
	Witwatersrand Local Division	Witwatersrand High Court	
	*Natal Provincial Division	*Supreme Court of Natal	
	*Orange Free State Provincial Division	*High Court of the Orange River Colony	
	asterisk * indicates that there are—	Circuit Local Divisions of each Provincial Division	*
		NO APPELLATE COURT WITHIN SOUTH AFRICA FOR ALL THE SOUTH AFRICAN COURTS	

#### 4. The Appellate Division

The appellate division of the supreme court of South Africa possesses only an appellate jurisdiction. In criminal cases, there is an appeal to the appellate division from provincial and local divisions before whom cases have been tried in the first instance, only on points of law. Such jurisdiction as the appellate division possesses in criminal matters is exercised under Act No. 31 of 1917 on an application for (a) arrest of judgment on the ground that the indictment discloses no offence; or (b) the consideration of a special entry on the record made on the application of the accused, in which a specified allegation of irregularity or illegality in the proceedings is made; or (c) the consideration of a question of law reserved at the trial by the presiding judge on his own motion or at the request of the prosecution or defence. The appellate division may either confirm the judgment of the trial court, or set it aside, or remit the case to the court below for judgment to be given if it has not already been given, or it may itself give such judgment as ought to have been given, or it may make such other order as justice may require.

From the above it appears that the Union does not possess a court of criminal appeal from trials held in the first instance in the superior courts (other than from the native high court, to

which reference is made below). This omission is due to the age-long doctrine that juries do not make mistakes on questions of fact, though judges may well make mistakes on questions of law. It is a matter of constant surprise to the ordinary layman who learns for the first time that persons may be convicted of murder or sentenced to imprisonment for life without being allowed any appeal on the facts of the case. The nearest appeal that may be brought on fact is a question of law reserved on the point whether there was evidence to go to the jury, and to succeed on this ground is most difficult. Some change in the law to allow appeals on facts in certain cases may allay the misgivings of many responsible thinkers. The court of criminal appeal in England is an example of what may be done in this direction.<sup>1</sup>

Arising out of this weakness is another, but this time the weakness is on the side of the accused and is to be condemned equally with the weakness which may send an innocent man to prison or to death. For under the interpretation which has been given to the criminal code of 1917, a person almost obviously guilty may escape punishment in certain circumstances. If there has been an irregularity in the proceedings which has prejudiced the accused, the conviction must be set aside, and the accused must be acquitted. For example, if evidence has been wrongly admitted, and the appellate division is of opinion that the admission of this evidence has prejudiced the accused (and any benefit of the doubt must be given to the accused), the conviction must be quashed. Now it nearly always happens in these cases that there would almost certainly have been a conviction without the admission of the irregular evidence, but just because a mistake has been made by the crown in leading the evidence and by the court in admitting it (and the accused, perceiving the error, remains quiet and unprotesting) the appellate division, if it thinks that there might possibly have been no conviction if such evidence had not been led, must set aside the conviction. For, just as the appellate division cannot sit as a court of appeal

<sup>1</sup> Since the above was written, and while this book was in the press, the General Law Amendment Bill was introduced in the Union Parliament in May, 1934. It failed to pass during that session, having been sent to a select committee, and it will be introduced again early in 1935. The Bill aims at making the appellate division a court of criminal appeal, and divides murder into murder in the first degree and murder in the second degree, making the death sentence discretionary in the latter case.

on questions of fact, when this point of law is brought before it, it must assume the same fictitious role and declare that as it is not a judge of fact, it is unable to say whether or not, without the wrongly received evidence, the accused would certainly have been convicted. The remedy for this weakness lies in the simple necessity for making the appellate division a court of criminal appeal on questions of fact as it is on questions of law.

Appeals from the magistrates' courts are brought to the superior courts having jurisdiction, and thence, after special leave has been given by it, to the appellate division. The same applies to civil appeals brought from the inferior courts.

Contrast now, with the criminal jurisdiction of the appellate division, its civil jurisdiction. It may hear appeals in trial cases from the decisions of a single judge of any superior court or a decision given by two judges in a trial case. It may examine every element in the evidence, and though it will not readily reverse a decision on pure questions of fact, it will not hesitate to do so if it is of opinion that such decision was wrong, or, to use legal phraseology, against the weight of evidence. Here, at any rate, an aggrieved person has the possibility of a remedy.

By the Administration of Justice (Further Amendment) Act, No. 11 of 1927, three judges of the appellate division form a quorum for appeals from a single judge; four from two or more judges. If four judges hear an appeal and are equally divided, the judgment of the court appealed from stands as the judgment of the appellate division, and costs follow such judgment, unless the appellate division by a majority decides otherwise. Three judges form a quorum in applications for leave to appeal, or in criminal matters, or in appeals from the native high court of Natal.

There is a great weakness in this statute, which has been dictated by the desire for economy. Applications, motions, petitions, orders as to costs only, and certain other matters, brought before a single judge, must be taken to three judges of a provincial division on appeal, and then, with special leave, to the appellate division. The original judge may allow the prayer in a petition; the three provincial judges may be divided, one in favour of the prayer, two against it. The appeal judges may be equally divided. In all, four judges are against the

prayer and four are in favour of it, yet it is disallowed. Litigants cannot be wholly satisfied.

By the Rhodesia Appeals Act, No. 18 of 1931, the appellate division has jurisdiction to hear appeals from the high court of Southern Rhodesia, as though they were appeals from a local division of the Supreme Court of South Africa, and by the Appellate Division Act, No. 12 of 1920, the appellate division has jurisdiction to hear appeals from the high court of South-West Africa, as though they were appeals from a provincial division of the supreme court of South Africa. Appeals may be brought in criminal cases from the native high court of Natal (this court's civil jurisdiction was abolished by the Native Administration Act, 1927) on questions of law as well as on questions of fact.

Sometimes the intermediate provincial division may be eliminated in the process of appeal to the appellate division by agreement between the parties in appeals from a single judge's decision in applications, motions, &c., or by agreement between the prosecutor and the accused in criminal cases before magistrates.

The appeal to the appellate division is not limited in respect of the amount in dispute or the nature of the case. Except in interlocutory matters, certain applications, and orders as to costs only, appeal may be brought as of right. Where appeal is brought from a court in which the matter has already been decided as an appeal, the leave of the appellate division must first be had.

The seat of the appellate division is at Bloemfontein. The South Africa Act provided that (section 109) 'The appellate Division shall sit in Bloemfontein, but may from time to time for the convenience of suitors hold its sittings at other places within the Union'. Owing to some dissatisfaction having been expressed in the Orange Free State at the hearing of appeals elsewhere than in Bloemfontein, the Administration of Justice Act, 1912, provided that the question whether appeals should be heard elsewhere than at Bloemfontein might only be decided by the appellate division sitting at Bloemfontein, and an application for an appeal to be heard elsewhere might be granted only in 'exceptional circumstances'. The effect of this amendment in the law is, in practice, to make it too expensive for appeals to



be heard elsewhere than in Bloemfontein, and it is very rare indeed for the appellate division to sit elsewhere.

The decisions of the appellate division are binding upon every court in the Union. The establishment of this court, therefore, marked a great advance in the securing of a uniform interpretation of the law throughout South Africa. However much the judges endeavoured to secure this end in pre-union days, there was often a conflict in the decisions of the courts of the four separate colonies. Now, each of the provincial and local divisions is bound to follow the decisions of the appellate division.

There are important statutory provisions which have for their object the harmonizing of the administration of justice and of judicial interpretation throughout the Union. The South Africa Act provides:

111. The process of the Appellate Division shall run throughout the Union, and all its judgments and orders shall have full force and effect in every province, and shall be executed in like manner as if they were original judgments and orders of the provincial division of the Supreme Court of South Africa in such province.

Criminal matters are dealt with by the Criminal Procedure and Evidence Act, No. 31 of 1917, as amended by Act No. 39 of 1926:

388. Whenever the Minister has any doubt as to the correctness of any decision in any criminal case on a matter of law by any superior court, the Appellate Division may, upon the application of the Minister, order that a special case be prepared for its consideration and that the matters which were determined by such decision be argued before it in order to obtain its ruling thereon; and such ruling shall thereafter be deemed by all courts to be the correct decision in the matter.

There is no analogous provision regarding civil matters. These are left to the discretion of suitors. If they are dissatisfied with judgments and think they are wrong, they may go to the Appellate Division at their own expense. The Magistrates' Courts Act, No. 32 of 1917, has a provision which, though it is not confined to criminal cases, is not likely to be, and has not yet been, applied to civil cases. By that act:

107. Whenever in one province any decision is given by a provincial or local division of the Supreme Court as to the interpretation of any provision of this Act in conflict with a decision of any other such court in another province, the Minister may proceed

to have a special case prepared for the Appellate Division and to have the matter argued before the Appellate Division in order to obtain its ruling thereon; and such ruling shall thereafter be deemed by all other courts to be the true interpretation of such provision.

## 5. Criminal Jurisdiction of the Superior Courts

(i) *Original Jurisdiction.* The South Africa Act left the superior courts of the Union in precisely the same position as regards criminal jurisdiction as before the establishment of the Union. The act created only an appellate division to which appeals might be brought on criminal matters from provincial or local divisions after special leave to appeal has been given by the appellate court. The several supreme courts, high courts, and circuit courts continued after the establishment of the Union to possess as provincial or local divisions (as the case might be) the same criminal jurisdiction which they had previously possessed. Presided over by a judge, and with a jury to determine questions of fact, such a superior court had before the establishment of the Union, and has now, practically unlimited jurisdiction in criminal cases within the area for which it was constituted. This jurisdiction, except in very special cases, comes into operation on presentation to the court of an indictment by the attorney-general of the province, or in the case of the Eastern Districts court, an indictment by the solicitor-general; and such indictment is presented after the accused has been committed for trial by a magistrate holding in a semi-judicial and semi-administrative capacity an inquiry called a preparatory examination.

The Criminal Procedure and Evidence Act, No. 31 of 1917, besides confirming the jurisdiction previously possessed, recognizes two other classes of superior court for the trial of criminal cases; (a) the native high court of Natal as a permanent court;<sup>1</sup> and (b) a special criminal court constituted by the governor-general-in-council on the request of the attorney-general for the trial of certain classes of cases where there are grounds for believing that the ends of justice may be defeated by a trial before a jury.<sup>2</sup>

<sup>1</sup> See section 9 of this chapter.

<sup>2</sup> See *infra*, Chapter XXII. By Act No. 20 of 1931, women and persons under the age of 15 years may claim to be tried by a jury consisting of women

Circuit courts are held at such places and on such days as the governor-general may approve, on the recommendation of the judge-presidents and judges of the provincial divisions concerned. Descriptions of the groupings of magisterial districts into circuit districts and the places and days of holding circuit courts are published in the *Gazette* from time to time.

Except in the case of the native high court and the special criminal court, or when an accused makes application to be tried without a jury, criminal trials are conducted before a jury of nine men, of whom seven at least must be unanimous as to the verdict returned. After a verdict, the court is limited as to the punishment by the provisions of the common law as to the offence, or in the case of a statutory offence, by the terms of the statute creating the offence. The court *must* impose the death sentence on convictions for murder except where the accused is a woman convicted of the murder of her newly born child or is a person under sixteen years of age, and the court *may* impose the death sentence on a conviction for treason or rape. In other cases the court may impose a fine or imprisonment or whipping, or all such punishments, and may also impose special classes of detention or punishment described later in the section dealing with inferior courts. On a third conviction for certain scheduled offences, a superior court may declare the offender to be an habitual criminal, and impose upon him an indeterminate sentence.

Under Act No. 31 of 1917 the attorney-general of a province (or the solicitor-general of the Cape Eastern districts) was vested with the right of prosecuting all offences, but under the amending Act No. 39 of 1926 such right is vested in the minister of justice, who may delegate his powers of prosecution to the above-mentioned persons.

(ii) *Appellate Jurisdiction.* Every decision involving a conviction in a criminal case by a magistrate's court, whether on law or on fact and whether against the conviction or against the

only. The qualifications for women sitting on a jury are the same as for men, but it is not a duty for women to be placed on the jurors' roll, but a right for which application must be made. If nine women are not available, either because of challenge or because there are fewer than eighteen female jurors available for service in the particular jury district, the trial proceeds in the ordinary way. There can therefore be no mixed juries consisting of men and women. Up to the present no women juries have sat.

sentence passed, is subject to an appeal by the convicted person to the provincial division within the area of jurisdiction covering the magistrate's court, or to a local division (with the single exception that the Witwatersrand local division has no appellate jurisdiction at all and appellants must go to the provincial division sitting at Pretoria). The court to which such an appeal lies may confirm, alter, or reverse the conviction, or vary the sentence, or remit the case back to the magistrate with instructions. Section 56 of Act No. 39 of 1926 has wisely altered the law, making it impossible for an accused to take undue advantage of success on appeal on a technical point such as the illegal admission of evidence, because the amendment in the law makes it competent for a new prosecution to be instituted, if an appeal has succeeded on the ground that evidence was illegally admitted or on some other irregularity.

In addition to the above appeal jurisdiction, the Magistrates' Courts Act, 1917, contains one of the most salutary provisions in any system of law and one most necessary in a country like South Africa with its large and mostly ignorant native population. This is the provision relating to automatic review. Whenever a sentence of imprisonment or other detention for more than three months, or a fine over £25 is inflicted, or whipping is ordered on a person more than sixteen years of age, the record of the case must be sent by the magistrate to the registrar of the division of the supreme court to which appeal may be brought, and it must be submitted immediately to a judge in chambers for his consideration. If the judge is satisfied that the proceedings have been in accordance with real and substantial justice, he gives his certificate to that effect. Otherwise the case is dealt with in open court, which possesses the same powers as it possesses on appeal. If the case presents any difficulty, or if the judge is in any doubt, the court may request counsel to argue the case before it fully. The junior bar always assists most willingly. The law reports abound with decisions of the judges on review, and a fair percentage of the reviews have ended in favour of the accused. Despite the automatic review, an accused need not wait or rely on it, but may appeal on his own behalf.

The crown may also appeal to the above court against any decision in a magistrate's court dismissing a summons or charge on the ground that it is bad in law or discloses no offence. The

reasonableness of this provision will be understood if it is explained that exceptions on the above grounds must be taken before any evidence is led and before the accused has pleaded. The accused, therefore, has not been in jeopardy, and the trial may continue if the crown's appeal is successful, or if it is not, the accused may be charged again. The crown may also bring the decision of a magistrates' court in a criminal case in review, but the provincial division's ruling on such review does not affect the decision in the particular case, but serves for the future guidance of magistrates' courts.

## 6. Criminal Jurisdiction of the Inferior Courts

The Magistrates' Courts Act of 1917 codified and amended the laws of the several former colonies regarding the inferior courts. The magistrates' courts of the Union owe their existence now to the aforementioned act. All these courts are creatures of this statute, and their jurisdiction, power, and authority are limited and defined by this statute and its amendments, and by the Criminal Procedure and Evidence Act, 1917, and its amendments. The ordinary jurisdiction of a magistrate includes the power to inflict a fine of not more than £50, or imprisonment with or without hard labour, spare diet or solitary confinement, the total period of imprisonment on each count not to exceed six months, and fifteen strokes in so far as corporal punishment is concerned. If a magistrate has committed a person for trial or sentence before the supreme court and the attorney-general has remitted the case back to the magistrate, his powers of punishment are twice those stated above as regards fine or imprisonment.

Magistrates have power to order adults to be sent to farm colonies or inebriate reformatories, and juveniles to juvenile reformatories. Sentences may be postponed or suspended on condition of good behaviour, or may be merely technical, such as a caution, or a reprimand, or imprisonment until the rising of the court.

Courts of special justices of the peace are now governed by Act No. 2 of 1918 and the two enactments mentioned above. Their jurisdiction is limited to: (i) statutory offences, for which the maximum penalty does not exceed a £25 fine or three months' imprisonment, or both; (ii) petty thefts or assaults; (iii) certain

petty rural offences respecting preservation of game, the pound laws, &c. ; (iv) contraventions of the Native Labour Regulation Act, 1911 ; and (v) *contravention of the Masters and Servants Acts*. In the last class of cases a special justice of the peace is given the full jurisdiction of a magistrate, but otherwise the powers possessed by a special justice are small, fines being limited to £10 and punishments to one month's imprisonment. Cases, however, may be transmitted by him to a magistrate whenever they are serious enough for this course to be taken, *and appeal against his decisions in all matters may be brought before a magistrate*, while the procedure of automatic review outlined above regarding magistrates' decisions in certain cases is adopted in all convictions by a special justice, the records being sent to the local magistrate and the review being conducted by him. Decisions by a magistrate in his appellate capacity may be taken to the supreme court.

While the jurisdiction of a special justice of the peace is limited in respect of both punishment and the subject-matter of the charge, the jurisdiction of magistrates, except in cases of homicide, treason, and rape (which classes of cases he may not try at all), is not limited in respect of the nature of the charge. There is a tendency to increase the punitive powers of magistrates, and recent statutes have given magistrates extended powers.

Most of the criminal cases of the Union are disposed of by magistrates. The system may be described as speedy, rough and ready, and, considering the amount of work which is performed by the magistrates, extraordinarily efficient. Magistrates are promoted from the ranks of officials in the departments of justice, after having taken certain examinations, and having acted as prosecutors. Their knowledge and experience of criminal work are therefore most thorough.

## 7. Civil Jurisdiction of the Superior Courts

The manner in which the several superior courts came into being at the establishment of the Union has been described above. A superior court has, in addition to any original jurisdiction exercised by the corresponding court of the colony at the date of the establishment of Union, jurisdiction in all matters in which the government of the Union or a person suing or being

sued on behalf of such government is a party, or in which the validity of any provincial ordinance comes into question. Generally it may be said that a provincial division in each province has unlimited jurisdiction throughout the province in respect of all causes or matters arising within that area; while each local division has jurisdiction (slightly restricted in some respects) in regard to causes arising and persons residing within its defined area. For example, the Witwatersrand Local Division, while it has concurrent jurisdiction with the provincial division so long as the cause or matter arises within its defined limits, is expressly excluded from exercising any appellate jurisdiction or from reviewing the proceedings of inferior courts. Special jurisdiction is given to any provincial division in which a parliamentary or a provincial council election is held (but not to a local division) to try election petitions.

The provincial divisions sit at Capetown, Pietermaritzburg, Pretoria, and Bloemfontein respectively. The Cape Provincial Division consisting of five judges, the Natal Division of four judges, the Transvaal Division of seven judges, and the Orange Free State Division of three judges. The Eastern Districts Local Division consists of four<sup>1</sup> judges, the Griqualand West Local Division of one judge, and one judge of the Transvaal Provincial Division may preside over any sitting of the Witwatersrand Local Division.

In all the Cape divisions, the court may sit with one judge only as a divisional court, and as many divisional courts as there are judges available to preside may sit at the same time for the dispatch of civil business. In the Transvaal and in the Free State (except in vacation time when one judge constitutes a quorum) the quorum of the court is two, except in motions, applications, and trial cases where the defendant is in default, when one judge sitting in chambers constitutes the court. A divisional court of one judge may exercise the civil jurisdiction of the court in any trial action if both parties consent, or if the action is remitted to such divisional court for trial by order of the full court.<sup>2</sup> The provisions applying to Natal are the same,

<sup>1</sup> See Eastern District Local Division Constitution Act, 1934.

<sup>2</sup> See Orange Free State Administration of Justice Amendment Act, 1934, bringing the Orange Free State practice into line with Transvaal Ordinance No. 31 of 1904.

except that a judge sitting in chambers has a more restricted jurisdiction.

In order to make the machinery of justice work more smoothly in actions between persons resident in different provinces, it has been provided that a civil process for commencing civil proceedings may, subject to compliance with certain forms, be served throughout the Union upon any defendant who resides or is for the time being within the Union, and is subject also to the jurisdiction of the court. When a defendant resides within the Union, no attachment of his person or property is necessary to found jurisdiction, and summonses are to be served in the ordinary manner personally upon the defendant.

The South Africa Act has certain provisions aiming at the facilitation of hearing actions and enforcing judgments:

112. The registrar of every provincial division of the Supreme Court of South Africa, if thereto requested by any party in whose favour any judgment or order has been given or made by any other division, shall, upon the deposit with him of an authenticated copy of such judgment or order and on proof that the same remains unsatisfied, issue a writ or other process for the execution of such judgment or order, and thereupon such writ or other process shall be executed in like manner as if it had been originally issued from the division of which he is registrar.
113. Any provincial or local division of the Supreme Court of South Africa to which it may be made to appear that any civil suit pending therein may be more conveniently or fitly heard or determined in another division, may order the same to be removed to such other division, and thereupon such last-mentioned division may proceed with such suit in like manner as if it had originally commenced therein.

All the divisions, except the Witwatersrand Local Division, may hear appeals from the decisions of magistrates in civil cases. The superior courts have also inherent jurisdiction to correct the proceedings of semi-judicial and administrative bodies whenever there has been gross irregularity or illegality.

### 8. Civil Jurisdiction of the Inferior Courts

On January 1, 1918, the new consolidating and amending Magistrates' Courts Act, No. 32 of 1917, came into operation, and, repealing the considerable number of statutes which had previously governed the inferior courts of South Africa, imposed uniformity in the jurisdiction and procedure of these courts



throughout the Union. The result is that a single code governs the constitution, jurisdiction, and rules of procedure of every inferior court hearing civil disputes in the Union.

The act provides that a magistrate's court shall have jurisdiction: (a) in actions in which is claimed the delivery or transfer of any property movable or immovable not exceeding £200 in value; (b) in actions of ejectment against the occupier of land or premises within the district if the right of occupation does not exceed £200 in clear value to the occupier; (c) in other sections (except those specifically excluded) where the claim or value of the matter in dispute does not exceed £200.

The following classes of actions, however, are specifically excluded from the jurisdiction of the magistrate's court, however little may be the amount at stake, viz. actions for or concerning: (a) divorce and judicial separation; (b) the validity and interpretation of wills and testamentary documents; (c) status of persons in respect of mental capacity; (d) specific performance of acts without the alternative of damages, except as to rendering accounts or delivering property not exceeding £200 in value; (e) decree of perpetual silence;<sup>1</sup> (f) provisional sentence.<sup>2</sup>

Except as to these specially excluded actions, a magistrate's court may acquire jurisdiction by the written consent of both parties, whatever may be the amount or value in dispute.

Incidental to the jurisdiction in civil matters, a magistrate may issue orders of personal arrest of persons suspected of absconding, orders of attachment of property, interdicts prohibiting the removal of furniture which is subject to the landlord's hypothec for rent, and its judgments may be enforced by execution against movables primarily and afterwards against immovable property which is not subject to prior charges, attachment of money in the hands of third parties belonging to the debtor or due to the debtor, and, on debts incurred previous to May 19, 1932, by imprisonment of the debtor himself.<sup>3</sup>

Appeals from the decisions of magistrates have already been

<sup>1</sup> A method of preventing the repetition of libels.

<sup>2</sup> Obtaining a form of summary judgment on liquid documents, i.e. bills of exchange, mortgage bonds, or any document regarding which it is not required to lead any evidence. The only allegations made in the summons are that the money claimed is owing and has not been paid.

<sup>3</sup> Act No. 17 of 1932 abolished civil imprisonment except in cases of misrepresentation.

dealt with. The parties may, however, agree in writing before the hearing of a case that there shall be no appeal, and that the judgment of the magistrate shall be final.

The Magistrates' Courts Act, 1917, has been applied to the mandated territory of South-West Africa.

Special justices of the peace have civil jurisdiction in matters in which a liquidated sum not exceeding £25 is claimed, but this court only has this jurisdiction if there is no magistrate's court within a radius of 25 miles. Appeal from this court lies to the magistrate's court.

## 9. Native Courts

Natives, in both civil and criminal matters, are, generally speaking, subject to the ordinary laws and the ordinary courts of the land. Certain special tribunals have, however, been established for the hearing of purely native cases, with a view to affording the native a simpler and less expensive method of procedure, and also to ensure that cases arising out of native law and customs are heard by officials experienced and learned in such laws and customs, and, in so far as native chiefs' courts are concerned, to accord a measure of recognition to purely native institutions.

### *Civil Matters*

In so far as civil matters are concerned, the following special native courts have been established:

(i) *Native Chiefs' and Headmen's Courts*. A native chief or headman appointed as such under the Native Administration Act, No. 38 of 1927 (as amended by Act No. 9 of 1929) may be authorized by the governor-general to hear and determine civil suits arising out of native law and custom between natives resident within his area of jurisdiction. An appeal from the decision of any such court lies to the court of the native commissioner.

(ii) *Native Commissioners' Courts*. The governor-general is empowered, under the Native Administration Act, 1927, to establish native commissioners' courts for the hearing of all civil causes and matters between natives only, provided that no such court shall have jurisdiction in any matter in which:

(a) The status of a person in respect of mental capacity is sought to be affected;

- (b) a decree of perpetual silence is sought;
- (c) provisional sentence is sought;
- (d) the validity or interpretation of a will or other testamentary document is in question; or
- (e) a decree of nullity, divorce, or separation in respect of a marriage contracted according to Christian or civil rites is sought.

Under this provision native commissioners' courts have been established in all districts in which there is a large native population resident under tribal conditions.

These courts are authorized to decide cases involving questions of customs followed by natives, according to the native law applying to such customs, except in so far as this law is repealed or modified or is against the principles of public policy or natural justice.

(iii) *Native Appeal Courts.* There are two native appeal courts in existence, one for the Cape and Orange Free State and one for the Transvaal and Natal. These courts were constituted under the above-mentioned act for the hearing of appeals from the native commissioners' courts. Each native appeal court consists of a president and two members. The president is a full-time officer appointed by the governor-general, while the members are appointed by the minister from time to time as required, and are selected from magistrates, native commissioners, and other qualified persons.

The decision of a native appeal court is final, except:

- (a) where conflicting decisions have been given by a native appeal court within its area of jurisdiction, in which case the minister may cause a special case to be argued before the appellate division of the Supreme court;
- (b) where the native appeal court consents to an application for leave to appeal, upon any point stated by the court, to the appellate division.

(iv) *Native Divorce Courts.* These courts were established to hear matrimonial suits between natives married according to Christian or civil rites. Each such court must consist of the president of a native appeal court, and its area of jurisdiction must coincide with that of a native appeal court. Two native divorce courts have accordingly been established with areas of jurisdiction coinciding with those of the two native appeal courts.

The jurisdiction of the supreme court as a forum of first instance for native divorce cases is not ousted by the native divorce courts, and, moreover, an appeal from the judgment of a native divorce court lies to the provincial or local division of the supreme court having jurisdiction.

### *Criminal Matters*

The special courts established for the exercise of criminal jurisdiction in respect of natives are as follows:

(i) *Native Chiefs' and Headmen's Criminal Courts.* The governor-general is empowered to grant to any native chief or headman jurisdiction over members of his own tribe resident upon tribal land or in a tribal location within his area, in respect of offences punishable under native law and custom. His jurisdiction is limited to a maximum penalty of two head of cattle, or £5. An appeal from the decision of any such court in a criminal matter lies to the magistrate of the district concerned.

(ii) *Native Commissioners' Courts.* The governor-general may confer criminal jurisdiction upon native commissioners in respect of offences committed by natives, subject to the jurisdiction of a magistrate's court. Appeals from the decisions of native commissioners exercising criminal jurisdiction so conferred lie to the supreme court.

(iii) *Natal Native High Court.* This court exercises criminal jurisdiction only. The court consists of a judge-president and three other judges and tries criminal cases, when the accused are natives, but without prejudice to the jurisdiction of magistrates' courts. It exercises jurisdiction in respect of all crimes, including capital offences, committed by natives, save certain particular classes of crimes specified in Natal Act No. 49 of 1898, as amended by Natal Act No. 30 of 1910. The jurisdiction of the supreme court as a court of first instance is expressly excluded in respect of such crimes committed by natives as are cognizable by the Natal Native High Court. In other words, this court takes the place, in criminal charges against natives, of the Natal provincial division of the supreme court.

## 10. Other Courts

(i) *Water Courts.* A water court is constituted by an itinerant water court judge who is an additional judge of the Cape

Provincial Division under Act No. 2 of 1924, as president and two assessors, one of them a competent hydraulic engineer attached to the irrigation department of the government, and the other a person selected from persons nominated by the governor-general for each proclaimed water court district. The Union has been divided into twenty-two water court districts.

(ii) *Income Tax Appeal Court.* A special court for income tax appeals was constituted by section 58 of Act No. 40 of 1925. The court consists of a president who must be an advocate of not less than ten years' standing, an accountant of not less than ten years' standing, and a representative of the commercial community, or alternatively, a mining engineer in cases related to the business of mining. The period of the above appointments is for five years. A case may be stated by this court at the request of the appellant or the commissioner on a question of law to a provincial or local division of the supreme court, and a further appeal may be brought to the appellate division.

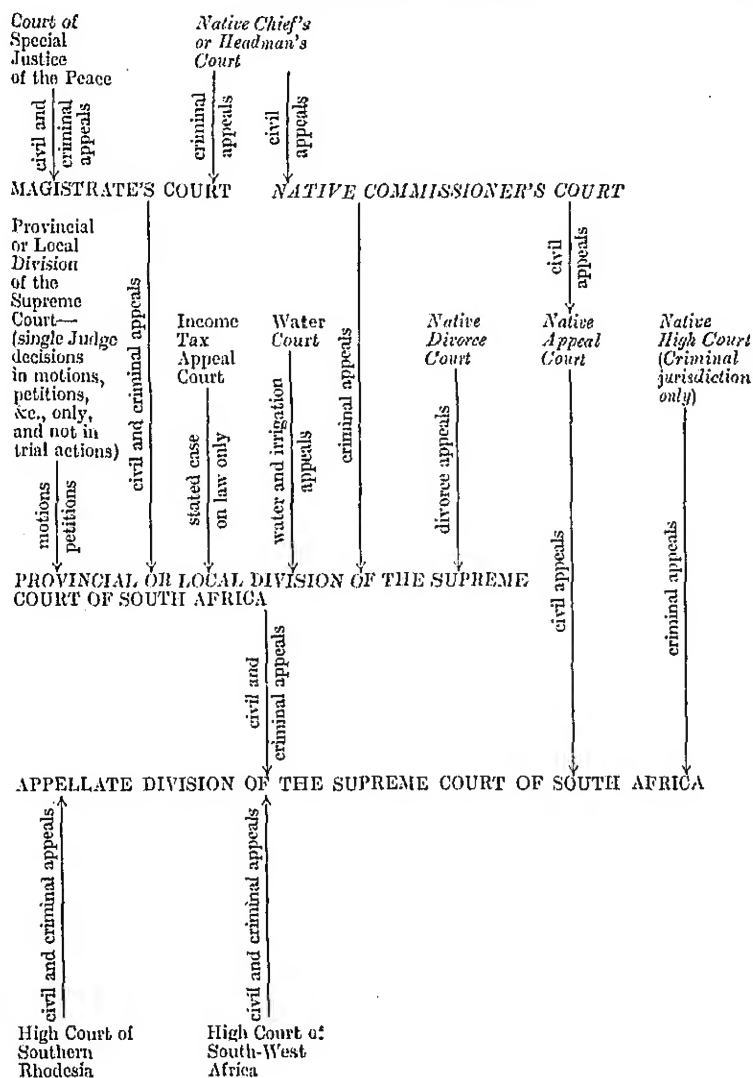
#### 11. Table showing Relationship of South African Courts to each other

The courts of special justices of the peace and the native chiefs' and headman's courts are petty courts, and there are not a great number of them in existence. The bulk of the civil and criminal work of the Union is done by the magistrates' courts for the European and native population, and the native commissioner's courts for the native population. These courts are the important inferior courts of the Union.

The provincial and local divisions of the supreme court of South Africa, besides exercising a most important original jurisdiction are connected with both the inferior courts as a court of appeal (except in civil matters from the native commissioners' courts, which go direct to the native appeal court), and with the native divorce court.

The following table shows the relationship to each other of the various South African Courts:<sup>1</sup>

<sup>1</sup> The Witwatersrand Local Division has no appellate jurisdiction at all. Appeals lie from the provincial or local divisions from appeals brought to them to the appellate division in all cases, usually after leave, but no leave is required in trial cases—see text. In all cases appeal to a local or provincial division can be brought without leave. The exclusively native courts are shown in italics.



## 12. Appeals to the Privy Council

Before the establishment of the Union there was an appeal as of right (as far as the law of South Africa was concerned) from the superior courts of the South African colonies to the privy council. Local statutes and ordinances only placed a

limitation on appeal according to the amount or value of the claim. The South Africa Act repealed this right (in the sense in which the word must be understood in this connexion) and left only the right of applying to the King-in-Council for special leave to appeal, which is enjoyed by subjects of the crown throughout the empire. The section is as follows:

106. There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King-in-Council, but nothing herein contained shall be construed to impair any right which the King-in-Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King-in-Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure: provided that nothing in this section shall affect any right of appeal to His Majesty-in-Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890.

The privy council will not readily grant leave to appeal. It will not do so in cases raising questions of a local nature; it may do so in cases raising serious constitutional questions.<sup>1</sup> Very few appeals indeed are heard from the appellate division of the supreme court by the privy council.

The South Africa Act preserved the prerogative of the crown regarding its right to grant leave to any of its subjects to appeal from a decision of His Majesty's courts in the dominions. This privilege of invoking the exercise of the royal prerogative by way of granting special leave to appeal has long obtained throughout the British Empire. In its origin it might have been no more than a petitory appeal to the sovereign as the fountain of justice for protection against an unjust administration of the law; but the practice has long since ripened into a privilege belonging to every subject of the King. It has been recognized and regulated in a series of imperial statutes.<sup>2</sup>

Before 1931, any law by a dominion parliament, in so far as it intended to prevent the King from giving effective leave to appeal against an order of a dominion court, was repugnant to the statutes of the United Kingdom regulating such right of

<sup>1</sup> *Whittaker v. Durban Corporation*, [1921] 90 L.J.P.C. 119; 124 L.T. 104; 30 T.L.R. 784.

<sup>2</sup> e.g. Judicial Committee Acts of 1833 and 1844.

appeal, and was therefore void and inoperative by virtue of the Colonial Laws Validity Act, 1865.<sup>1</sup> Only the parliament of the United Kingdom could negative this statutory as well as prerogative right.<sup>2</sup>

Whilst the Colonial Laws Validity Act remained in force, the above was the legal position. But, with the passing of the Statute of Westminster, 1931, the force and effect of the Colonial Laws Validity Act have been swept away, and there is now nothing to prevent the Union parliament prohibiting any citizen of the Union from asking leave to appeal to the privy council or of enacting that its judgments shall have no effect in South Africa. The Status of the Union Act, 1934, left this right of appeal intact as well as the provision that bills limiting the right of appeal must be reserved for the King's pleasure.

### 13. Judicial and other Officers of the Law

*Judges.* The judges of the supreme court hold office and are appointed under the following provisions of the South Africa Act:

99. All judges of the supreme courts of the Colonies, including the High Court of the Orange River Colony, holding office at the establishment of the Union shall on such establishment become judges of the Supreme Court of South Africa, assigned to the divisions of the Supreme Court in the respective provinces, and shall retain all such rights in regard to salaries and pensions as they may possess at the establishment of the Union. The Chief Justices of the Colonies holding office at the establishment of the Union shall on such establishment become the Judges-President of the divisions of the Supreme Court in the respective provinces, but shall so long as they hold that office retain the title of Chief Justice of their respective provinces.
100. The Chief Justice of South Africa, the judges of appeal, and all other judges of the Supreme Court of South Africa to be appointed after the establishment of the Union, shall be appointed by the Governor-General-in-Council, and shall receive such remuneration as Parliament shall prescribe, and their remuneration shall not be diminished during their continuance in office.
101. The Chief Justice of South Africa and other judges of the Supreme Court of South Africa shall not be removed from office except by the Governor-General-in-Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity.
102. Upon any vacancy occurring in any division of the Supreme

<sup>1</sup> *Nadan v. The King*, [1926] A.C. 491.

<sup>2</sup> *Cushing v. Dupuy*, (1880) 5 A.C. 409.



Court of South Africa, other than the Appellate Division, the Governor-General-in-Council may, in case he shall consider that the number of judges of such court may with advantage to the public interests be reduced, postpone filling the vacancy until Parliament shall have determined whether such reduction shall take place.

The salaries and pensions of the judges are fixed by the Judges' Salaries and Pensions Act, No. 16 of 1912 as amended by the Judges' Salaries (Amendment) Act, 1934. The following table shows the salaries and pensions which the judges receive:

	<i>Annual salary</i>	<i>Annual pension</i>	<i>Pension on less than 10 years' service</i>
Chief justice of South Africa . . .	£3,500	£1,300	£130
Ordinary judge of appeal . . .	£3,250	£1,200	£120
Judge-president of a division <sup>1</sup> . . .	£3,000	£1,100	£110
Puisne judge of a division <sup>2</sup> . . .	£2,750	£1,100	£100
			for every year of service

A judge who has served for ten years or more may retire from office at the age of sixty-five and be entitled to his pension, and all judges shall retire from office at the age of seventy years.

*The Master of the Supreme Court.* In each province, having his office at the seat of government of the province, there is an officer appointed by the governor-general, styled the master of the supreme court.<sup>3</sup> The master administers and has an almost exclusive supervision over the property of deceased persons, minors, lunatics, persons permanently absent from the Union without a lawful representative therein and whose whereabouts is unknown, and persons under curatorship. The master also supervises the administration of insolvent estates.

Each master keeps a complete record of original wills, death notices, inventories, and accounts of estates. Deceased estates are administered by executors, who are usually appointed by will or by the next of kin. Insolvent estates are administered by trustees, usually elected by the creditors, and sometimes

<sup>1</sup> The judge-president of the native high court of Natal receives a salary of £1,500 per annum with a pension on the usual scale. The presidents of the native appeal courts receive £1,100 per annum.

<sup>2</sup> Puisne judges of the Natal native high court receive £1,400 per annum. The president of the income tax court receives £1,500 per annum.

<sup>3</sup> Administration of Estates Act, 1913.

appointed by the master. But all persons acting in an executory or trust position in relation to estates act under the supervision of the master.

There is a fund known as the guardians' fund, into which are paid all moneys, which are to be held in trust for minors, absent persons, lunatics, or moneys unclaimed by their owners. The fund pays interest at the rate of  $4\frac{1}{2}$  per cent. compounded annually. The moneys credited to the guardians' fund are deposited with the public debt commissioners of the Union, but the master may at any time withdraw any part of the working balances which are retained at his disposal by the public debt commissioners.

The master is an officer of the public service and the conditions governing his employment are laid down in the Public Service Act, No. 27 of 1923. The salaries of the masters of the supreme court are as follows:

Cape and Transvaal . . . . .	£950—30—1,100.
Natal and Orange Free State . . . . .	£800—25—900.

The master is an indispensable adjunct of the supreme court, for he is the administrator and guardian of all estates and minors, and seeks through the supreme court the redress of any breach of the obligations owed by persons to estates and minors.

*The Minister of Justice and the Attorneys-General.* The minister of justice is the head of the department of justice and the executive head of the administration of justice. The South Africa Act lays down:

139. The administration of justice throughout the Union shall be under the control of the Minister of State, in whom shall be vested all powers, authorities, and functions which shall at the establishment of the Union be vested in the Attorneys-General of the Colonies.

There is an attorney-general for each of the four provinces, and a solicitor-general for the Eastern Districts of the Cape of Good Hope. In South Africa the attorney-general is an officer of the public service and is in no way concerned with politics as in other British countries. He is promoted from the professional side of the department of justice to his post as attorney-general. Act No. 39 of 1926 provides that

1. (3) All powers, authorities, and functions relating to the prosecution of crimes and offences in the name and on behalf of His Majesty

the King are vested in the Minister of Justice who may in any Province assign to an officer, to be appointed by the Governor-General subject to the provisions of the law relating to the Public Service, styled the Attorney-General or in the area of jurisdiction of the Eastern Districts of the Cape of Good Hope Local Division of the Supreme Court, the Solicitor-General, the exercise, as his deputy, of such powers, authorities and functions in the area for which such officer has been appointed.

In practice, the minister of justice does not interfere with the prosecution of crimes. The attorney-general is the director of public prosecutions, and appears in court either by himself or his assistants, or local public prosecutors, or authorizes counsel on circuit. He has a full discretion regarding the institution and withdrawal of prosecutions. The minister of justice has made it a very strict rule not to interfere with this discretion of the attorney-general, perhaps not even to inquire into any cases, save on the clearest evidence of irregularity. The minister's duties are not even supervisory; his power is always held in reserve. The attorney-general's office, therefore, is strictly screened from the influence of the public, politics or the cabinet, and though the legal profession is always free to make representations on behalf of their clients, it may with justice be said that the high standard of integrity of the attorneys-general has made the administration of the justice in South Africa something of which the country is proud.

It is not intended to detail the duties and powers either of the minister or the attorney-general. It is sufficient to say that the former recommends to the cabinet the appointment of judges, and himself appoints magistrates. The minister has great powers under various acts, e.g. the riotous assemblies acts, and he countersigns all executive documents of his department, including death warrants. The attorney-general, besides his ordinary duties as chief prosecutor for the crown, is also the *curator ad litem* for persons alleged to be of unsound mind.

The following salaries are paid to the attorneys-general:

Transvaal and Cape . . . . .	£1,300—30—1,540.
Natal . . . . .	£1,150—30—1,300.
Orange Free State . . . . .	£1,050—30—1,200.

*Magistrates.* Magistrates hold their appointments by virtue of the Magistrates' Court Act, 1917, or by reason of an appointment under a pre-Union statute. The latter appointments are

recognized by the 1917 Act. Their powers and duties are strictly limited by the statute. Their salaries vary from £495 per annum in the case of a junior appointment to £1,300 a year in the case of a chief magistrate, with pensions. The duties of magistrates are judicial and administrative. Most of the administrative duties devolve upon magistrates stationed in the country districts, but a great many onerous duties fall upon magistrates in charge of urban magisterial areas.

In rural districts the magistrates are also receivers of revenue and many hold the position of native commissioner. Magistrates preside over liquor licensing courts, and generally have numerous other duties, like the landdrost of the republican days, concerning the activities of almost all government departments—too numerous to detail.

Magistrates, like attorneys-general and masters of the supreme court, are officers of the public service and the conditions governing their employment are laid down in the Public Service Act, No. 27 of 1923.

*Native Commissioners.*<sup>1</sup> These preside over native commissioners' courts. In many districts, magistrates hold the appointment of native commissioner and come under the control of the department of justice; in others the native commissioners are officers of the department of native affairs. They perform the administrative duties which the minister of native affairs may from time to time assign to them. By law they have the powers of justices of the peace, and in their courts the powers conferred by the jurisdiction granted to such courts under the Native Administration Act, No. 38 of 1927.

*Sheriffs and Messengers.* The registrars of the four provincial divisions of the supreme court of South Africa are also the sheriffs of those provinces. They are appointed by the governor-general-in-council and are members of the public service. Sheriffs have authority as such to appoint deputy-sheriffs. Messengers of court serve the processes of the magistrates' courts and are appointed by the minister of justice under the Magistrates' Courts Act, 1917. They are not members of the public service, and like deputy-sheriffs are remunerated by fees.

<sup>1</sup> The chief native commissioners receive £1,000 per annum. The salaries of the native commissioners vary from £575 per annum to £1,000 per annum, according to grade.

*Advocates and Attorneys.* The legal profession in South Africa is divided into two branches on lines exactly the same as in England, and the etiquette governing the conduct of the legal profession has been taken from English practice.

The universities in South Africa qualify students for practice at the bar. The degree of bachelor of laws, granted after obtaining the degree of bachelor of arts and passing the university law examinations, the minimum duration of the combined courses being five years, entitles a person to be admitted by the supreme court for practice before that court. A member of the English bar has to take a statutory examination in Roman-Dutch law and South African statute law before he can be admitted to practice.

Solicitors take the law certificate examinations and require three years' service in the offices of a qualified solicitor. Special examinations in conveyancing and notarial practice are required to be passed before practice in these branches of the law is permitted. All practising barristers and solicitors must be British subjects.

## XVIII

### THE LEGAL SYSTEM OF SOUTH AFRICA

THE practising lawyer in South Africa, when called upon to ascertain the law governing a particular set of facts, has, like his brother practitioner in England, first to ascertain whether any statutes exist which may rule out the application of the common law. Such statutes may be acts of the Union parliament or regulations issued under the authority of acts of parliament, provincial ordinances and regulations under them, or municipal by-laws. If there are no statutes applicable, recourse must be had to the common law. Under statutory authority, a set of customary practices, variously referred to as native law, native custom, or native usage, entirely distinct and separate from the ordinary common-law of the country, is applicable to disputes between native and native. We propose in this chapter to deal briefly with the three branches of the laws of South Africa, namely, the common law, the statute law, and native law.

#### 1. The Common Law

The common law of South Africa is the Roman-Dutch law of Holland in so far as it has been accepted in South Africa, modified by the interpretation of the courts, and left unrepealed by the enactments of local legislatures.

The practitioner who wishes to find out exactly what the common law is on a particular point will consult a modern South African text-book or a digest of cases in order to ascertain whether the courts have yet decided a similar question. In this respect the South African practitioner is in more or less the same position as his English brother. The decision of the highest court in the land (the appellate division) is binding. The law declared by the judges of appeal is the right law. Only parliament can change the law as declared by that court. If there is no decision of the appellate division, the practitioner will look for decisions of the superior courts. He will give most respect to the decisions of the Transvaal and Cape

provincial divisions; and a full, if not quite equal respect to the decisions of the other courts. He will remember that in pre-Union days, the Transvaal had a famous bench, most of whose members later adorned the appellate court, judges who, like Chief Justice de Villiers, of the Cape supreme court, were great law-makers as well as great judges. Their decisions carry great weight and are not easily ignored. The decisions of a full court of a provincial division are binding upon single judges in that division, and a supreme court decision is binding upon magistrates' courts.

But law being what it is, the decisions of even the provincial divisions may be wrong. He is a bold advocate who argues they *are* wrong. He must remember that in matters of practice and procedure, especially practice of long standing, the appellate division will be slow to interfere; and a provincial division has declared that where the court has followed a particular rule, even of law, for a long time and on a number of occasions, that rule will not be reversed even if wrong, because the people are entitled to act upon the repeated declarations of the supreme court having jurisdiction over them. How is a practitioner to ascertain that any particular decision of a provincial division (in the absence of a decision of the appellate division) is wrong? He will go to the 'authorities' of Roman-Dutch law, namely, the text-books, the opinions, the dissertations, and the 'advices' of the famous old writers of Holland, and the decisions of the courts of Holland in the sixteenth and seventeenth centuries. He may even have to go as far back as the Roman law, or consult the works of German commentators on the Roman law, or such books as the *Traité des Obligations* of Pothier.

In England, extracts from the books of celebrated dead authors may be quoted in argument. Such extracts may lend weight to an argument; the court treats them with respect. But the Roman-Dutch authors' works stand on a different footing. These dead men's books are the only living witnesses of what the Roman-Dutch law of Holland was. If the judges are satisfied that the author quoted from the bar correctly states the Roman-Dutch law, the judges will declare what the author has stated to be the law. Some writers carry more weight than others; a preponderance of opinion is usually con-

clusive unless conditions have so changed that such opinions can no longer be followed. The following extract from a judgment will show how the judges follow the old authorities, and go back even to the Roman law:

'Van Leeuwen, *Roman-Dutch Law*, remarked that "he whose animal causes damage to another must make compensation or deliver up the animal for the same. But if the animal be wild by nature, or otherwise of a mischievous propensity, as for instance, a dog accustomed to bite, or a horse accustomed to kick, or the like, the owner will be liable to make full compensation for the damage done without being able to get off by giving up the animal". The only authorities relied upon for the above pronouncement were *Digest* 21. 1, secs. 40 to 41 and *Institutes* (4. 9. pr). *Van Leeuwen* was dealing therefore with the *de pauperie* and the *Aedilitian* remedies. And the mere fact that he omitted to notice the *contra naturam* principle in the one, and the public place limitation in the other, could not have been intended to indicate that the law had been altered in those respects either by obsolescence or amendment. What he seems to have done was to class vicious domesticated animals with those naturally ferocious, as was done in the case of a dog by the Edict, and in the case of other animals by the Criminal Ordinance of Charles V. In the *Censura Forensis*, however, he merely stated the Roman Law. A passage in *Grotius*, which is the one referred to by *Schellinga*, must also be noticed. Having stated that the *actio de pauperie* was operative in Holland on the lines of the Civil Law (see 3. 38, par. 10), he proceeded to say that, "the owner of a dog which has killed anyone's swans or other birds is bound to make good the loss, without its being sufficient for him to give up the dog" (3. 38, sec. 13). But he did not intend to contradict himself or to assert that the Common Law of Holland had widened the scope of the Civil Law remedy; for, a reference to *Recht. Observatien* (vol. ii, obs. 96) shows that he must have had in mind certain local *Keuren* and a *Placaat* of 1559, but not the general law of the country. There is no need to quote further authority; for in spite of some confusion, there can, I think, be little doubt that *Voet* was right when he said (9. 2, sec. 9) that the law of Holland in regard to compensation for damage done by animals was in substance the law of Rome.<sup>1</sup>

The persuasive influence of English law has been very great. The introduction of the English jury system necessitated the adoption of the English rules of evidence in both criminal cases and civil cases. The English system of pleading, and many English rules of court practice, have resulted in the constant quotation of English authorities in the South African

<sup>1</sup> *O'Callaghan v. Chaplin*, [1927] A.D., at p. 320.



courts. English text-books are constantly consulted. Wessels says:

'The English barrister who attends a South African court must often wonder what we really mean when we say the Roman-Dutch law is the common law of South Africa. He hears a dispute about a contract, or perhaps an action for damages in a running down case. He hears the pleadings read, and to him the claim in convention and claim in reconvention, the declaration, plea and rejoinder are familiar terms. The very form in which these are couched is the same as he was accustomed to in England. The rules of evidence are the same he learnt at his Inn or College, and when the argument is reached he hears quotations from such familiar books as Addison or Leake on Contracts, Addison or Pollock on Torts, and he finds that both bench and bar refer to the same law reports with which he is familiar in England. The arguments are closed, and the decision is given upon English authorities and sometimes not a single Dutch authority is even casually touched upon.'<sup>1</sup>

The judgments of the privy council have had a very great influence upon the decisions of the South African courts. Not only are appeals which have been brought from South Africa tinged with English legal ideas because the judicial committee is not always familiar with the finer points of the Roman-Dutch law, but judgments by the privy council on disputes brought from other parts of the British commonwealth, and the judgments of English courts are referred to with great respect on a similar set of facts by the South African courts, even though they are in no way binding in South Africa.

*Introduction of Roman-Dutch Law into South Africa.*<sup>2</sup> The system of law first known as Roman-Dutch law is that which obtained in the province of Holland during the existence of the republic of the United Netherlands. Its main principles were carried by the Dutch into their settlements in the East and West Indies. When some of these, including the Cape of Good Hope, were annexed by or ceded to Great Britain, the old law was retained as the common law of the territories which now became British possessions.

'With the expansion of the British Empire in South Africa, the sphere of the Roman-Dutch law has extended its boundaries until the whole of the area comprised within the Union of South Africa . . . as well as . . . Southern Rhodesia, has adopted this system as its common law. This

<sup>1</sup> J. W. Wessels, *History of the Roman-Dutch Law* (Grahamstown, 1908), p. 387.

<sup>2</sup> This section is based on Professor R. W. Lee's classical *Introduction to Roman-Dutch Law* (Oxford, 1931).

is the more remarkable, since in Holland itself and in the Dutch colonies of the present day, the old law has been replaced by modern codes; so that the statutes and textbooks, which are still consulted and followed in the above-mentioned British dominions, are no longer of practical interest in the land of their origin.<sup>1</sup>

Roman-Dutch law itself is a combination of Roman law and Germanic custom, after a process of development which was almost completed in the fifteenth and sixteenth centuries. It was brought to the Cape by van Riebeeck in 1652; and the law administered subsequently to the Dutch occupation of the Cape was the Roman-Dutch law of Holland, so far as it was applicable to local conditions, the statutes of the East India Company when they were locally promulgated, and the enactments of the local governors. When all the above were silent, recourse was had to the law of Rome.

When the Cape was finally taken by the British in 1806, the continuance of Roman-Dutch law was the expression of the settled principle of English law and policy that colonies acquired by cession or by conquest retain their old laws. Very little remains, however, of the pre-British statute law of the Cape. Most of these early statutes have been abrogated by disuse.

As Cape Colony expanded, the Roman-Dutch law extended its sphere by the same natural process without express enactment, and when the republics of the Orange Free State and the Transvaal were established, the Roman-Dutch law was established at the same time.<sup>2</sup> It was introduced into Natal by Cape Ordinance No. 12 of 1845, Zululand in 1897, Basutoland in 1884, Bechuanaland in 1909, Southern Rhodesia in 1891, Swaziland in 1907 and South-West Africa in 1919.<sup>3</sup>

The South Africa Act especially provided that the laws in force in the four colonies should continue to be in force after the establishment of the Union until repealed by parliament. This provision applied not only to the common law, but also to the statute law of the four colonies.

<sup>1</sup> R. W. Lee, *Introduction to Roman-Dutch Law* (Oxford, 1931), p. 2.

<sup>2</sup> A resolution of the Volksraad of the South African Republic of September 19, 1859, gave statutory authority to the legal treatise of van der Linden, failing which, the commentaries of van Leeuwen and the introduction of Grotius were to be binding. This enactment was repealed by Proclamation 34 of 1902 and the Roman-Dutch law was made generally applicable by enactments in 1902.

<sup>3</sup> By the Administration of Justice Proclamation, 1919. See also Union Act, No. 49 of 1919, and Proclamation No. 1 of 1921.

*Sources of the Roman-Dutch Law.*<sup>1</sup>

(i) *Treatises.* The numerous works of the Dutch jurists, written in Dutch and Latin from the sixteenth to the nineteenth centuries, are cited to-day as authoritative statements of the law with which they deal. The works of these old writers have a weight almost comparable to that of the decisions of the courts.

The principal writers on the old law and their most important works are the following: Grotius: *Introduction to Dutch Jurisprudence*, 1631; Vinnius: *Commentaries*, 1642; Groenewegen: *Tractatus de Legibus*, 1649; van Leeuwen: *Censura Forensis*, 1662, *Roman-Dutch Law*, 1664; Huber: *Praelectiones Juris Civilis*, 1678; Johannes Voet: *Commentarius ad Pandectas*, 1698; Bijnkershoeck: *Quaestiones Juris Privati*, 1744; van der Keessel: *Theses Selectae*, 1800; van der Linden: *Handboek*, 1806.

(ii) *Statute Law.* The enactments of the states-general and of the states of Holland are to be found in the ten folio volumes of the Groot Placaat Boek. The statutes of Batavia are printed in van der Chijs, *Nederlandsch-Indisch Plakaat Boek*. The pre-British statutes of the Cape exist, but have not been printed. The present law of intestate succession for the whole of the Union is to be found in a charter of the East India Company of January 10, 1661, the *Political Ordinance* of 1580 and the *Interpretation* thereof of 1594.

(iii) *Decisions of the Dutch Courts.* The many published volumes of *Decisiones* are a valuable source of law. They are summaries of the actual decisions of the Dutch courts.

(iv) *Opinions of Jurists.* The *Hollandsche Consultatien* contains the opinions of Grotius and other eminent lawyers. Such consultations and opinions are a characteristic feature of the Roman-Dutch system of jurisprudence.

(v) *Custom.* This is in every country a source of law. The whole of Roman-Dutch law is really a modification of Roman law by Dutch customs and statutes.

The above remain to-day the sources of Roman-Dutch law in South Africa; but these sources are supplemented by enactments of the local legislatures, and the decisions of the local courts. Much that is written in the old books is obsolete or

<sup>1</sup> The summary given in this and the next section is based on Professor R. W. Lee's *Introduction to Roman-Dutch Law* (Oxford, 1931).

superseded. The courts have declined to follow doctrines which are out of harmony with the conditions of modern life, and rules of the old law are often explained and modified according to the demands of modern conditions. The supreme court of South Africa, and especially its appellate division, is year by year producing a body of judge-made law which is an expansion and development of the old Roman-Dutch law. Aided by the powerful influence of the English law in every sphere of commercial law, the common law of South Africa has attained a completeness, a symmetry and elasticity which meets all the requirements of a modern civilization.

*Features of Modern Roman-Dutch Law.*

In a work of this kind, it is impossible to do more than give a short summary of the salient features of modern Roman-Dutch law. The criminal law of the Union is not generally different from the criminal law of England. The terminology used is in most cases the same. The division of crimes into felonies and misdemeanours is unknown. The general principles of the law of persons, of property, of contract, of delict, and of succession are given below. Many of the statements are necessarily made in general terms, for it is impossible to go into detail.

*The Law of Persons.* Parentage involves the duty of reciprocal support between parents and children. The duty on the part of parents continues until the children have sufficient means or are able by their industry to support themselves. Children, likewise, must maintain their indigent parents. In every case the proper process to enforce this duty is by petition to the court. The power of parents over their children includes their custody, control, and education, the management of any separate property belonging to the children, and the granting or refusing consent to marriage while the children are still minors. The marriage of a minor contracted without parental consent may be set aside by the Court at the suit of the parent. A person is a minor until he or she reaches the twenty-first birthday, but majority may be accelerated by marriage or by *venia aetatis*. The latter phrase indicates a method of granting emancipation by the governor-general-in-council on a petition to him, after the petition has been referred to the supreme court for inquiry.

Emancipation is granted for reasons which are usually in the discretion of the court to recommend as being proper, and concern the right of responsible minors to carry on business or manage their own property (without the right, however, of being able to alienate immovables). The only province in which *venia aetatis* has been granted is the Orange Free State, and the granting of it is very infrequent. Marriage puts an end to minority absolutely in the case of the male, but not in the case of the female, for she is placed (save for certain exceptions) in the care and control of her husband. The contracts of minors are divided into a number of categories. If the child is too young to know what he is about, he cannot enter into a contract at all with or without assistance. If he is old enough to understand what he is doing, his contracts are good if he has been benefited by them. For example, contracts by minors for necessaries are enforceable against them. If a minor carries on a trade or profession, with the permission of his parent or guardian, he may validly contract in relation thereto. Minors can, of course, ratify their contracts on reaching the age of majority.

Guardians are either testamentary or appointed. In default of a testamentary guardian, who may be a person other than a surviving mother, who however is entitled to guardianship if no other guardian is appointed, a tutor dative is appointed by the master of the supreme court. The duties of guardians are to give security to the master of the supreme court, to make a full inventory of the estate for the master, to educate the children with the income of the estate, and generally to administer the minor's estate with the diligence of a *bonus paterfamilias*. They may not alienate immovable property without the leave of the court; must render annual accounts to the master of the supreme court, represent the minor in court, and authorize his necessary transactions. Guardians are removed on the grounds of insolvency, dishonesty or insanity. Curators dative are appointed by the court for insane persons and prodigals.

Marriage is permitted between boys over fourteen years and girls over twelve, provided they obtain their father's or guardian's consent. Those who are insane or impotent cannot contract a valid marriage. Intermarriage is forbidden within the degrees defined by the Political Ordinance of 1580 of the States of Holland and by local statutes. The legal consequences of

marriage consist principally in the wife becoming subject to the marital power of the husband as far as she and her property are concerned, that is, she remains or becomes a minor, and she takes his domicile and nationality. Marriage creates *ipso jure* a community of goods between the parties. The husband may alienate or encumber his wife's property as he pleases, but she cannot do so without his consent. The husband may contract in his wife's name and render her liable or entitled under contracts so made. The wife cannot, without the consent of her husband, render herself liable by her contracts except in cases in which a minor would be liable. Thus she and her husband may be held liable for contracts which are solely for her benefit or by which she has been enriched, or for household necessities. Further, if with her husband's consent she has become a public trader, she binds herself and her husband by her trade contracts. If the husband has deserted his wife and is absent from the jurisdiction, she may contract in her own name. This unfortunate position of a wife under the common law may be guarded against by the parties entering into a contract before their marriage known as an ante-nuptial contract. This must be notarial and registered in the office of the registrar of deeds. Generally speaking, any condition not contrary to law or good morals may be inserted in an ante-nuptial contract. The usual conditions provide for the exclusion of community of property and the marital power, leaving it to each party to manage his or her own affairs and contract without restraint regarding his or her own interests. But parties often get married without such wide liberty of contracting being given to the wife. It is a matter of personal discretion. Ante-nuptial contracts, once made, cannot be revoked or modified while the parties are alive except by the court. If the ante-nuptial contract has testamentary provisions regarding mutual succession, alteration is allowed, generally speaking, only by mutual will.

Divorce is decreed by the supreme court on the ground of adultery or malicious desertion. In neither case is cruelty necessary, nor is there any minimum time limit in the case of desertion, except in Natal where eighteen months is required to elapse between the desertion and the commencement of the suit. In desertion cases the court in the first instance issues an order calling upon the defendant to restore conjugal rights by

a certain date, usually about two months ahead, failing which a final decree of divorce is granted. Alimony to the wife is not enforceable after divorce.

Judicial separation is granted on the ground of cruelty, which has received a wide interpretation, as well as on the ground of adultery or malicious desertion. The result of separation is to relieve the parties from the personal consequences of marriage, but not to dissolve the marriage tie. The common estate is usually divided or alimony is ordered to be paid. Nullity of marriage is decreed when the parties have married within the prohibited degrees, or when minors have married without consent, at the suit of a parent, or when one of the parties was impotent or insane at the time of marriage, or in case of antenuptial stuprum followed by pregnancy of the wife, unknown to the husband and not condoned.

Donations between spouses are prohibited during their lifetime, but, if validly executed, are confirmed by the death of the donor. A surviving spouse, before contracting another marriage, has to pay or to secure to the minor children of the first marriage the shares due to them out of the estate of the deceased, otherwise the defaulting spouse forfeits for the benefit of the minor children a sum equal to one-fourth of his or her share in the joint estate, besides incurring a statutory penalty of fine or imprisonment.

*The Law of Property.* Property is classified according to the rules of the Roman law, but the most important classification is the division of all property as either movable or immovable. Immovable things and things deemed to be immovable are land and houses, things naturally or artificially annexed to land or houses (such as growing trees or fruits, minerals, stones), movables annexed to houses even though temporarily removed, certain movables enjoyed with land or destined for perpetual use therewith, servitudes, actions *in rem* directed to the recovery of immovables, annual rents charged on land, and leases of immovable property so far as they create rights *in rem*. Mortgages, however, even of land, are classed as movables, the mortgage being considered as merely accessory to a principal and personal obligation, whose nature it therefore follows. All other property, generally speaking, is classed as movable, and includes money and rents accrued due, securities, mortgages, &c.

The importance of this distinction of things as movables or immovables is chiefly that immovables require special formalities of sale, transfer or hypothecation. All transfers of land require registration in the deeds registry. Leases of immovable property for ten years or more must be notarially executed and registered; in Natal leases for two years or more must be in writing. Land may be held either on freehold or leasehold title, or on perpetual tenure from the government.

*The Law of Contracts.* The law of contract in South Africa is similar to that in England. The parties must be agreed; they must intend to create a legal obligation; the object of the agreement must be physically and legally possible; the agreement must not have been procured by fraud, fear, misrepresentation or undue influence, and the agreement must not be directed to an illegal object. The only differences from English law appear to be in the requirements of form and in the doctrine of consideration. Roman-Dutch law requires neither form nor consideration for a contract to be valid. But statutory provisions have been introduced. Natal has a statute closely following the English Statute of Frauds, and throughout South Africa, transfers of land, mortgages, and long leases of land, as well as ante-nuptial contracts must be registered in the office of the registrar of deeds for the province. Consideration in the sense required by English law finds no place in Roman-Dutch law, e.g. a promise in South Africa is valid if made for reasons of gratitude, past happenings or close relationship. All that is required is for the contract to be made deliberately and for a moral or reasonable cause. The Roman-Dutch law allows a stipulation in a contract to be made for a third or absent party, and if that third party accepts the stipulation it becomes binding. The consequences of non-performance of a contract give rise to actions for damages based on substantially the same principles as in English law, or actions for specific performance of the contract. Where a defendant can be made to perform a contract instead of paying damages, the court has a discretion to order specific performance. The most frequent case for a decree of specific performance is a contract for the sale or lease of land. The interpretation and determination of contracts are governed by the same principles as they are in England. Different periods of prescription apply in each province.



Certain special contracts may be referred to. Donation is regarded as a contract and thus requires all the essentials of an ordinary contract and is generally irrevocable. Gifts over £500 in value must be registered. The *donatio mortis causa* is, however, revocable before death. The contract of sale is complete so soon as the parties are agreed as to the price, and property passes upon delivery, unless a suspensive condition is attached to the sale. If in a sale for cash the price has not been paid the seller may recover the property within a reasonable time. Special rules apply to contracts of suretyship by women. Before a woman can be a surety she must renounce the benefit of the Roman *senatus consultum velleianum*, and of the *authentica si qua mulier* also, if she is married, and these benefits have to be explained to her before she signs.

*The Law of Delict.* The first class of delicts is wrongs against the person, such as assault, false imprisonment, malicious arrest, seduction, &c. The action for seduction has no resemblance to the English action for seduction which a father brings for the pretended loss of his daughter's services. It is an action brought for the loss of maidenhood. Wongs against property, such as nuisance, are governed by principles analogous to the English law on the subject, but trespass in South Africa requires 'injuria' or actual damage to ground an action. A trespass is 'injurious' when it is committed in defiance of or as a denial of another's right or accompanied by circumstances of insult or contumely. If a person has suffered pecuniary loss by the death of another, he has an action for damages for the loss suffered. Wongs against reputation are based on 'injuria', which, however, is usually inferred. Defamation, verbal or written, requires no proof of special damage, but false statements injuring a person in his trade or profession, even though not defamatory, require proof of malice and special damage. The action for malicious prosecution is framed on the English model.

*The Law of Succession.* 'No department of the Roman-Dutch law is more thoroughly penetrated by the Roman tradition than that of testamentary succession.' Wills must be executed in the presence of two competent witnesses. Testamentary trusts are known as fideicommissa. A fideicommissum is created by such words as these: 'I make my wife my heir, but when she comes to die, I desire that the property shall go to' (certain named

persons). General prohibitions of alienation are not upheld. The fideicommissary property vests in the first instance in the heir, who has to give security for the restoration of the property, undiminished in value, to the person named, and the fideicommissum may be expressed to determine on death or upon the happening of a contemplated event during lifetime. A fideicommissum, therefore, is a grant of property to a person subject to a condition that he will hand over the property after the happening of a certain contemplated event to a third party. It must be distinguished from usufruct, which is a life tenancy or use of property, but where the ownership vests not in the usufructuary but in the heir. Mutual wills are made by husband and wife together, but once made cannot be changed if the survivor has adiated or accepted benefits under the will.

By the Succession Act, 1934, the surviving spouse of any person who dies either wholly or partly intestate is declared to be an intestate heir of the deceased spouse according to the following rules: (a) if the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint estate, does not exceed six hundred pounds in value (whichever is the greater); (b) if the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed six hundred pounds in value (whichever is the greater); (c) if the spouses were married either in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato*, but leaves a parent or a brother or sister (whether of the full or half blood) who is entitled so to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed six hundred pounds in value (whichever is the greater); (d) in any case not covered by paragraph (a), (b), or (c), the surviving spouse shall be the sole intestate heir. The law of intestate succession, except as to the succession of a surviving spouse, follows the provisions of the Political Ordinance of 1580 of the States of the Province of Holland as interpreted by an

Edict dated May 13, 1594, and extended to the Cape with modifications by a charter granted to the Dutch East India Company on January 10, 1661. Only blood relationship, save for the succession of spouses to each other, is recognized in intestacy. The deceased's share of the estate goes to the survivor and the children equally, subject to the above rules. If there are no children and both spouses are dead, and their parents are alive, the parents divide the estate between them. If only one parent of a deceased spouse is dead, the surviving parent gets half the estate and the brothers and sisters of the deceased the other half. If both parents are dead, the estate is divided between the brothers and sisters of the deceased. If a brother or sister is dead, his or her children take the share due to their parent. If there are no brothers or sisters, succession goes through grandparents to uncles and aunts and their children. Failing all blood relations, the estate vests in the crown after forty years. The rules relating to intestate succession are extremely complicated and the reader is directed, if he wishes to know more of the subject, to study the usual text-books.

Professor Lee in his *Introduction to Roman-Dutch Law* writes of Roman-Dutch law as follows:

'At present we get our knowledge of the law of South Africa from the Statute Book, from the decisions of the South African Courts, and from an extensive literature in Dutch and Latin dating from the sixteenth to the early nineteenth century. As the reader will find, use has been made of this last-mentioned source in the following pages. But few people have the leisure or inclination to become familiar with these old books. For the practitioner, who makes an occasional raid upon them for an immediate purpose, they present every disadvantage. It has been said of the Roman-Dutch Law of to-day that its text-books are antiquated and its weapons rusty. The reproach is well founded, and those who recognize the substantial merits of the system would wish to see it removed.

'Happily time provides a remedy. The Parliament of the Union of South Africa and the Appellate Division of the Supreme Court, which hears appeals also from Southern Rhodesia and from the Protectorate of South-West Africa, are year by year producing a body of statutory and judge-made law, in which the principles of the Roman-Dutch Law are being expounded and developed. It may be anticipated that under such auspices the Roman-Dutch Law will assume a completeness and a symmetry which it has failed to attain in previous ages. It will be a system in which the best elements of the Roman and the English law will be welded together in a harmonious and indissoluble union. As

the *corpus* of South African Law grows to maturity, the old folios and quartos, which some of us have learnt to handle with a feeling almost of affection, will be less and less consulted. Having served their turn they will yield to the fate of all things mortal. But the spirit of justice which inspires them and the rules of law which they express will live embodied in new forms. It may be that codification will come. This has even been urged as the one sure barrier against the all-pervading influence of English Law. But is the time yet ripe for it? The Law of South Africa is at present in a singularly fluid condition. It is passing through a period of formation. The way for codification must be prepared by consolidating legislation, by judicial decision, and perhaps not least, by the activity of our Schools of Law.<sup>1</sup>

## 2. Statute Law

It is not intended to describe the statute law of the Union in detail. The Bills of Exchange Acts, the Companies Act of 1926, the Insolvency Act of 1916, the Insurance Act of 1923, matters of trade marks and copyright, income tax law, workmen's compensation, and generally all commercial statutes follow English precedents very closely. Statutes have established a registrar of births, marriages, and deaths, a public health organization, and a system of miners' phthisis compensation, suited to the special conditions of the country. There is only one aspect of the statute law of South Africa that requires detailed examination, namely, the system of deeds registration.

*The Deeds Registries.*<sup>2</sup> The outstanding feature of the immovable property laws of the Union is the system of deeds registration. Whenever land or other fixed property is sold, the deed of transfer must be registered in the deeds registry having jurisdiction. Mortgages upon land, long leases, and ante-nuptial contracts must also be so registered.

The system of land registration in the Union requires that every deed granting or conveying landed property should have attached to it a diagram of the property being disposed of, or a reference back to a previous deed with such a diagram appended must be made. The area of the land, its dimensions, locality, description of its boundaries, and other distinguishing features, must be clearly set forth in the diagram referred to in the deed of conveyance of which it forms a component part.

<sup>1</sup> *Ibid.*, p. 25. For 'Protectorate of South-West Africa' 'Mandated Territory' should be read.

<sup>2</sup> See Act No. 13 of 1918.

The need for accuracy in the survey upon which the diagram is based is obvious, and to insure this, no diagram is accepted for registration with a deed of grant or transfer, unless it is signed by a surveyor duly admitted to practise as such in the province where the land in question is situated, and is further approved by the surveyor-general of that province. A Land Survey Act for the Union was passed in 1927, consolidating all previous laws, regulations, and tariffs of the four provinces.

It is essential for the purpose of registration that all transfer deeds and mortgage bonds shall have been drawn or prepared by persons duly authorized by law to do so and be executed in the presence of the registrar concerned. All conveyancers are so authorized. Other deeds are only registered if they have been executed in the presence of a notary public and attested by his signature. There are in the Cape Province four deeds registry offices, situated at Capetown, King William's Town, Kimberley, and Vryburg. Each registry is in charge of an officer styled a registrar of deeds, and effects registration in respect of that portion of the province specially allotted to it. The deeds office of Natal is situated in Pietermaritzburg, and of the Orange Free State in Bloemfontein. The Transvaal has two deeds offices, the deeds registry at Pretoria with jurisdiction extending over the whole of the Transvaal except the registration of leases of lots in leasehold townships in the mining districts of Johannesburg and of mining titles in the Transvaal area; but the Pretoria registry keeps duplicates of registrations in the Johannesburg district. For the latter area and for mining titles in the Transvaal there are the mining titles and Rand townships registration offices in Johannesburg, which form a division of the mines and industries department, under the control of a registrar.

The principal functions of the various registrars of deeds are the following: (a) to register grants or leases, by the crown, of land; (b) to examine, attest, and register deeds of transfer or hypothecation of land; (c) to register cessions of mortgage bonds, or renunciations, or waivers, by the legal holders; (d) to effect the necessary registration in connexion with the cancellation of mortgage-bonds, or part-payments, or releases therefrom; (e) to register ante-nuptial contracts, general or special notarial bonds, notarial deeds of servitude and of donation,

and other notarial deeds registrable by law; (*f*) to register leases and cessions of leases of rights to minerals; (*g*) to register usufructs of land; (*h*) to register notarial deeds of lease of land for ten years and upwards; (*i*) to issue and register such certificates of title to land as may be prescribed by law; (*j*) when so required by law, to satisfy themselves in connexion with the registration of any deeds—(1) that the duties, taxes, fees, and dues payable to the government or to the provincial administration have been paid; (2) that rates or charges payable in respect of land to a local authority have been paid; and (*k*) generally to exercise all such powers and discharge all such duties as are by statute and common law imposed upon them; and (*l*) in the case of the Rand townships and mining titles registrar to register deeds relating to stands or lots situated in government, semi-government, and privately owned leasehold townships in the mining districts of Johannesburg, Boksburg and Krugersdorp, the registration of which is effected solely by the Rand townships registrar, and to register deeds relating to all mining titles, and the various rights granted under the laws dealing with the exploitation of precious and base metals and minerals, the registration whereof is done by the registrar of mining titles.

### 3. Native Law<sup>1</sup>

*The Nature of Native Law.* 'Native law is the indigenous system of customary jurisprudence existing among the various Bantu tribes of South Africa. It must be carefully differentiated from laws affecting natives, such as pass laws or laws relating to Christian marriage among natives. The test is that native law, properly so termed, was in existence among the Bantu prior to any European influence or control. Native law is customary law, exactly like Roman-Dutch law or English common law, and obviously it is unwritten. Can we distinguish it from mere custom? It is a profitless question, perhaps, for the frontier-line between the two cannot be definitely ascertained and beaconed off; and we might very well adopt the usual and question-begging phrase "native law and custom". But there is a danger, if we do this, of creating the false impression that native law is not law in the sense that the unwritten common law of any country is law. Native law is every whit as valuable, as fixed, and as rational a system (so far as the law of persons is

<sup>1</sup> This section is based upon E. H. Brookes' *History of Native Policy in South Africa from 1830 to the present day* (Capetown, 1924), and G. M. B. Whitfield's *South African Native Law* (Capetown, 1930).

concerned) as Roman-Dutch law. In primitive times—and that means less than a century ago, for our purposes—native law was duly administered by courts of chiefs and counsellors, who possessed power to put their decisions into practice, all over South Africa.<sup>1</sup>

A system of native law has for generations been uniformly recognized and administered in South Africa. Although an unwritten law, its principles and practice were widely understood by the natives, being mainly founded upon customary precedents, embodying the decisions of chiefs and their councils of bygone days, handed down by oral tradition and treasured in the memories of the people. This law took cognizance of certain crimes and offences; it enforced certain civil rights and obligations; it provided for the validity of polygamic marriages; and it secured succession to property and inheritance according to simple and well-defined rules. But the system was a primitive and barbaric system, intermixed with a number of pernicious and degrading usages and superstitious beliefs, and administered by a judicial procedure which in cases of sorcery, witchcraft, &c., was utterly subversive of justice and repugnant to the principles of humanity.<sup>2</sup>

In considering the system of existing native law, it is essential at the outset to inquire into its derivation and source. The power of making law did not vest in the chief, although at times certain despotic chiefs endeavoured to persuade the people that the will of the chief was the law of the tribe. But the chief was himself subject to the laws in force when he assumed his chieftainship. The laws have grown up among the people, and are only administered by the chief. Their laws, if changed at all, are changed in consultation with the council of the people. With the exception of the military autocracies established over the Zulus by Tshaka, over the Matabele by Mzilikaze, and by the chief Mswazi in Swaziland, the rule of the native chiefs in South Africa was not so irresponsible as it is generally believed to have been. Their will was tempered and to a large extent controlled by a council so weighty and influential that no step of serious tribal importance was taken until the whole matter had been discussed by it at length. If a chief, who attempted a change of

<sup>1</sup> E. H. Brookes, *History of Native Policy in South Africa from 1830 to the present day* (Capetown, 1924), p. 172.

<sup>2</sup> See, on all topics of native law, G. M. B. Whitfield, *South African Native Law* (Capetown, 1930).

law or custom, did so without consulting his councillors, and without allowing the proposed change to be publicly and thoroughly canvassed before it was adopted, the possibility would be, if the law were at all objectionable, that the disaffected portion of his tribe would withdraw its allegiance from him, and transfer it to some subordinate chief of the same clan.

The council of the tribe consisted of advisers of the chief, generally spoken of as councillors. They were the direct representatives of the people's wish, and in the very considerable freedom of speech permitted to them at their assemblies, the popular voice found means of expression. A councillor was not formally appointed; he simply became such as his opinions at the public gatherings of the tribe increased in weight, and as he acquired popular influence he grew to be accepted more and more as representative of a section of the tribe. It might be courage and warlike achievement, wealth, skill in public debate, penetration in the unravelling of the intricate windings of native law suits, or other personal attributes which made him a representative and a public man. At their homes the councillors were recognized as arbitrators in civil disputes. A few were always found at the 'great place' (the chief's personal residence), where they largely relieved the chief of the burden of judicial cross-questionings, and assisted him in executive and administrative work, fulfilling many of the duties of ministers of state under more advanced forms of government. There was no form of election, but sufficient has been said to show that the council was distinctly representative of the people's voice. No sooner did any matter of concern to the tribe arise than the councillors were summoned, no important action being taken until it had been fully discussed in all its bearings. The laws of the natives thus embodied the tribal will.

There are many tribes in South Africa, but among all there is great similarity in the systems of law. The modifications of detail are unimportant. Professor Brookes has admirably summed up the leading principles:

'Native criminal law can hardly be said to have formed a distinct system from native civil law. But all European administrations in South Africa have drawn the distinction, and, even where recognizing civil law, have virtually ignored the native customary rules regarding crime. The punishments in native law were death and cattle fines.



Imprisonment was unknown. Death was the penalty commonly inflicted for murder of a chief or parent or for desertion from the tribe; and of course for witchcraft. The main crimes punishable by fine were murder, adultery, rape, arson, theft, maiming, or injuring cattle, causing cattle to abort, false witness, speaking disrespectfully of authorities, and using love philtres. The last four were considered deserving of specially heavy fines. Murder, apart from incidents of warfare, was not common.

'In many of these cases, particularly theft, the procedure was what we should call a civil, rather than a criminal one. The cattle [of the offender] or the bulk of them, went to the injured individual; but in the case of murder, all usually went to the chief.

'Of all this mass of public or quasi-public law, all that remains recognized by European Courts to-day is the status of chiefs, headmen, kraal heads, &c., and the doctrine of communal responsibility—illustrated in the so-called "spoor law"—a law based on intimate knowledge of native judicial conceptions—which provides that if the "spoor" of stolen cattle be traced to a certain kraal, and it proves impossible to detect the actual thieves, the whole kraal is responsible.

'This chain of mutual responsibility is very fully and admirably worked out in the Natal Code of 1891. The whole system is strikingly illustrative of Maine's and Vinogradoff's contention that status is the determining factor in all systems of archaic law.

'Coming now to that part of native law—frequently termed native civil law—which has received more adequate recognition from the various Governments of South Africa, we find ourselves in a region of intense interest to the legal investigator. The main elements of native law hinge on a few leading principles. The subjection of the female sex to the male and of children to their father or the head of their family—primogeniture among males as the general rule for succession—the incapacity, generally speaking, of women to own property—polygamy with its accompanying lines of demarcation according to "houses" in parts of the polygamist's property—adoption, or guardianship, or other conventional or hypothetical fatherhood.

'It will be gathered that native law is in the main a law of persons. And as a law of persons it is admirably worked out with exquisite skill, comparing very favourably with early Roman or Germanic law. Its rules of intestate succession are such as to make professional exponents of *Scheppendomsrecht* and *Aasdomsrecht* grow pale. Parenthetically it may be pointed out that testate succession is unknown—a striking proof of Maine's contention that intestate succession was first in the history of legal development. As regards relationship the Bantu are still in the agnatic stage: a mother may, and frequently does, moreover, come under the guardianship of her own son. The most interesting features of the Bantu law of persons to laymen are the institutions of polygamy and of *lobola*—the passing of cattle prior to marriage.

'The law of property is much less worked out. Individual property in land is unknown in native law. All the land at the moment occupied

by a tribe is held to vest in the chief, not in his personal capacity but (to import our ideas into a less advanced system) in trust for the tribe. A chief could not, e.g., alienate tribal land with any binding effect except by a tribal act, involving full and public discussion with his councillors. The tribe is the utmost entity normally conceived of by native law. A paramount chief had, in practice, no power to adjudicate between tribes as to the ownership of land. A quarrel between tribes would be analogous not to a law-suit but to a war—a matter of “international law” shall we say? The individual tribesmen possessed nothing but the right to occupy at the chief’s good pleasure.

‘The movable property of the Bantu, under tribal conditions, consisted mostly of livestock. The only normal ways of acquiring this property, under such conditions, were by inheritance, gift, or *lobola* payment. Sale was absolutely unknown, and barter very uncommon.

‘Naturally as the simplest and most rudimentary forms of contract were practically foreign to the Bantu mind, there was no law of contract at all. This provides us with two interesting points of departure. The entire absence of a law of contract suggests to us that, as a legal system, native law is more archaic than the oldest extant Roman law; and a detailed study of it is therefore a matter of intense interest to the scientific investigator of jurisprudence. Secondly, the absence of contract among a people like the Bantu, possessing the rudiments of civilization, a distinct and effective government and an admirable system of personal law, is a very convincing disproof of the suggestion that government is based on contract and a clear indication that the State has evolved from the family, and is to be explained ultimately by sex, the divine sacrament of society.’<sup>1</sup>

*The Recognition of Native Law.* Native law was first recognized in the Cape Colony upon the annexation of that part of the country now known as the Transkeian Territories, when provision was made in 1897 (by proclamation) for the administration within these territories of the laws of the Cape Colony both in civil and criminal matters, except that where all the parties in civil suits were natives, the magistrates were authorized to apply, at their discretion, native law and custom.

Prior to the passing of the Native Administration Act, 1927, there was no straightforward recognition of native law in the Cape Province proper. In the Bechuanaland districts of Cape Colony the operation of native law was fixed by statutory regulation. Proclamation 2 of 1885 (British Bechuanaland) gave chiefs exclusive jurisdiction in civil cases between natives of their own tribes, and they were allowed to retain criminal jurisdiction, except as regards certain grave crimes. Section 21 of the Native

<sup>1</sup> *History of Native Policy*, p. 175.

Administration Act, 1927, provides for the retention of the jurisdiction of native chiefs in Bechuanaland in civil and criminal matters, with certain modifications.

In the Transkeian Territory of the Cape Province native law is recognized, and is administered at the discretion of the courts in civil suits between natives involving questions of customs between natives. Here native law is susceptible to definition, limitation, and amendment by the governor-general-in-council, so that it can be moulded to suit the progress of the people, and thus it neither shackles their development, nor forces, as an alternative, the premature adoption of principles of law alien to their conceptions and experience.

In the Transvaal, native law derives its validity from the terms of Law No. 4 of 1885, supplemented by sections 70 and 71 of Proclamation No. 28 of 1902.

In the Transvaal several limitations were placed on native customs. It was held in *Rex v. Nalana*,<sup>1</sup> and in *Rex v. Mboko*<sup>2</sup> that marriage according to native custom was invalid as being inconsistent with the principles of civilization. In *Kaba v. Ntela*<sup>3</sup> it was held that *lobola* (the price payable for a bride) is not recoverable, and that a mother is entitled to the guardianship of the children of native marriage unions; and in *Meesedoosa v. Links*<sup>4</sup> it was decided that the custom under which a native woman remains a perpetual minor in native law cannot be recognized.

In Natal the recognition and application of native law is governed by section 80 of Act No. 49 of 1898.

In Natal, native law is fully recognized, and it was in fact codified by Law No. 19 of 1891, so that the incidents of customary marriage, *lobola* and succession, are provided for. This code, however, was rigid, and could be amended by statute only, which militated against its ready adaptability to changing conditions. This objection has, however, been met in section 24 (1) of the Native Administration Act, 1927. Section 24 (2) of this act provides for the extension by proclamation of the native code of native law to Zululand in the province of Natal. Zululand is at present subject to the Natal Code of 1875.

In the Orange Free State, principles of succession and

<sup>1</sup> [1907] T.S. 407.

<sup>2</sup> [1910] T.S. 964.

<sup>3</sup> [1910] T.S. 445.

<sup>4</sup> [1915] T.P.D. 357.

guardianship according to native customs are recognized, while in the native reserve of that province (Witziesshoek) the chief there is authorized to hear minor civil cases according to native law.

Just as there were and are discrepancies in the Roman-Dutch law in the various provinces, there were more in the native laws, for native law was unwritten and unreported. The judges of the supreme court have on several occasions expressed the view that the legislature should take steps to resolve the uncertainty as to the recognition of native law and custom. As native law is unwritten, we are witnessing, probably in the only instance in the world at present, the development of judicial law in this respect in its very early stages. Native custom is provable as a fact in each case until established by judicial decision.

It is doubtful whether native law can ever be entirely assimilated by Roman-Dutch law.

‘Their customs are so interwoven with the social conditions and ordinary institutions of the Native population, that any premature or violent attempt to break them down, or sweep them away, would be dangerous in the highest degree. . . . The aim . . . should be to wean them gradually from those customs and to provide machinery by which they may be enabled, in course of time, to emerge from their uncivilized conditions, and join the ranks of their fellow-subjects, enjoying the benefits of a more enlightened system.’<sup>1</sup>

The legislative powers, however, for the reshaping of the native administrative and legal system has been provided by the Native Administration Act, 1927.

*Maxims in the Application of Native Law.* The following are the more important maxims in the application of native law:

(i) Native law will only apply in disputes between native and native, and not where one of the litigants is a European.<sup>2</sup>

(ii) Native laws and customs must be proved as facts. The court does not take judicial notice of them.<sup>3</sup>

(iii) In any matter where native law does not furnish a remedy, the ordinary law will apply.<sup>4</sup>

<sup>1</sup> *Report of the Cape Government Commission on Native Laws and Customs*, 1883.

<sup>2</sup> *Msindo v. Moriarty*, 16 S.C. 539.

<sup>3</sup> *Sengane v. Gondole*, 1 E.D.L. 195; but see *Ngcobo v. Ngcobo*, [1929] A.D. 233.

<sup>4</sup> *Willie Nguma v. Jemima Koni*, 3 N.A.C. 162.

(iv) The courts will not apply law contrary to public order, public policy, morality, chastity, equity or natural justice.<sup>1</sup>

(v) The courts will not enforce any claim which in any way involves a party to the dispute in slavery or immorality.<sup>2</sup>

(vi) The courts will not recognize customs which are inconsistent with the very essence of the conjugal union, e.g. incestuous marriages.<sup>3</sup>

(vii) The custom by which a woman is treated as a chattel 'is abhorrent to the spirit of our law and of our constitution. . . . It is nowhere enacted that there is an heritable right in the enforced services of a fellow subject of the crown, much less a right of property in the person of such a subject.'<sup>4</sup>

(viii) Where the plaintiff has contracted a Christian marriage, she falls under the ordinary civil law of the Union; any actions flowing from marital rights, such as damages for adultery, must be dealt with under Roman-Dutch law.<sup>5</sup>

<sup>1</sup> See Whitfield, *South African Native Law*, p. 25, and the cases there cited. This is the ordinary rule of public policy.

<sup>2</sup> *Sengane's Case*, *supra*.

<sup>3</sup> *Nggobela v. Sihle*, 10 S.C. 346.

<sup>4</sup> *Sengane's Case*, *supra*.

<sup>5</sup> Whitfield, *South African Native Law*, p. 5, and unreported cases. See also section 22 of Act No. 38 of 1927.

## XIX

### ADMINISTRATIVE TRIBUNALS AND ADMINISTRATIVE LAW

THE 'rule of law' as understood by constitutional lawyers is the application of the ordinary law of the land in the ordinary courts of the land.<sup>1</sup> In most countries there now exists a scheme of administrative law and a number of administrative tribunals, and their existence is entirely foreign to the ideas underlying the 'rule of law', as that phrase is commonly understood.

Administrative law comprises that body of rules and regulations drawn up under statutory authority which determines the position and liabilities of state officials, the rights and liabilities of private individuals in their dealings with the state, and the procedure by which these rights and liabilities are enforced.

Administrative law in South Africa has not yet developed to the extent that it has in Europe, but the increasing complexity of the national life has compelled the state to extend its authority and to entrust its officials with new duties of management in every direction. This development has been entirely statutory. It is as foreign to the Roman-Dutch common law as it is to the English common law to have tribunals of semi-judicial jurisdiction, controlling, by means of their powers of punishment, public business, and from which there is no—or only a limited—power of appeal.

In South Africa, the need for governmental intervention by regulation is correspondingly less than in the United Kingdom or the United States or Canada, for the country is not as fully industrialized as are the older countries of the world. Almost all public utility services in South Africa are state-owned; and the great industry of the gold mines of the Witwatersrand is subject to strict governmental supervision. In South Africa, also, magistrates have been given the duty of acting as administrative tribunals, especially in an appellate capacity.

Before discussing administrative law in South Africa, it is proposed to give the reader certain illustrations of administrative

<sup>1</sup> See *infra*, Chapter XXII. For important criticism of the 'rule of law', see W. Ivor Jennings, *The Law and the Constitution* (London, 1933).

tribunals and of administrative powers in the framing of regulations. It is impossible to give more than a brief summary of the provisions of selected acts and regulations. Under the heading of railways and harbours attention is drawn to the immense powers of framing regulations, which bind the ordinary citizen of the country who uses the railways or is upon railway premises. For the breach of these regulations, the citizen can be punished only in the ordinary courts of the land. Administrative tribunals have, however, been set up to try and punish servants of the railway administration who have committed breaches of the regulations. But, be it noted, these servants are not exempt from the ordinary law of the land as far as railway offences cognizable by the law courts are concerned. In South Africa, if such an offence is one cognizable by the courts (e.g. an offence which consists of malicious damage to railway property, negligence causing death or injury, or theft of public money), the offender would be brought before an ordinary law court. There are, however, matters such as indolence, ~~an~~ duty or gross discourtesy to the public which are not offences by ordinary law, but which certain railway regulations have made matters of misconduct. These matters are not cognizable by the ordinary courts, but railway administrative tribunals have powers to punish servants of the administration who are guilty of such misconduct, as well as servants who are offenders against those railway regulations which are cognizable in the ordinary law courts. We thus have an illustration of administrative law in the sense that it consists of regulations framed by the railway administration having all the authority of ordinary law and governing the conduct of ordinary citizens on railway premises. This is not administrative law in the sense that it is administered by an administrative tribunal. We have also an illustration of administrative law in the sense that the rules or regulations of this administrative law are made by the railway administration and are enforced by administrative tribunals.

Next we may consider the public service. Here the regulations are framed for the purpose of enforcing discipline in the service, and the regulations are enforced by an administrative tribunal. The personnel of the administrative tribunals referred to above may vary in every case brought before it; it may very often be the permanent head of a department; it is rarely, if ever, a

person outside the railway or public services. There is no appeal to the ordinary law courts from these tribunals.

Under the Mines and Works Act we have administrative or semi-judicial tribunals of another character. A government inspector is appointed and he has certain duties connected with enforcing the safety of employees in mines and factories. Where a regulation, which may be made by government officials or mine managers, is alleged to have been contravened, the inspector of mines or machinery is constituted a court and he tries the offence. An appeal lies from his decision to a magistrate. This court, though it administers administrative law in the sense that the regulations are made by government officials for administrative purposes and not by a legislature in the ordinary sense of the word, more closely approximates to an ordinary law court than an administrative court. It has jurisdiction, not over public servants, but over ordinary citizens working as employees in mines or working with explosives or dangerous machines.

The next illustration of an administrative tribunal is the Miners' Phthisis Board. This board is appointed by the government for three years. Its work is specialized and requires specialized knowledge, dealing as it does with claims for compensation for various stages of phthisis. It is assisted by medical advisers and hears evidence. Its work is partly administrative, partly judicial; it hears claims; it orders the claims to be met; it controls and administers funds. It is a board appointed by the government administering funds in which the government has an interest and regulating the relationship between miners' phthisis claimants and the miners' phthisis funds, in the latter instance acting in a semi-judicial capacity, in the former in a purely administrative capacity.

In the next place we have the Road Transportation Board appointed by a minister to protect the interests of the department over which the minister presides, and in its discretion to restrict the activities of individuals competing with the business of that department. The ordinary courts are invoked to enforce the decisions of this body, but from these decisions itself there is no appeal to the ordinary courts. The Road Transportation Board is an administrative body with semi-judicial powers.

The last illustration given is afforded by the immigration boards established by the Immigrants' Regulation Act of 1913.



Here, for reasons of high state policy, no appeal on the facts is allowed. Immigration is a state matter in which a private individual has no rights and no privileges. The state is, in this instance, in a privileged position far above the ordinary individual.

We do not refer to the defence force and the police and prisons services, for these are governed by special codes of military, police, and prison regulations, which are almost the same as those in the United Kingdom.

### 1. Illustrations of the Workings of Administrative Tribunals and Administrative Regulations in South Africa

*Railways and Harbours.* Under the Railways and Harbours Regulation, Control and Management Act, No. 22 of 1916, the Railways and Harbours Board has made regulations controlling the speed of trains, the loading and delivery of goods, the manner in which passengers shall travel, the control of ships entering harbours, the duties and conduct of the administration's servants, the crossing of railway lines, and generally 'for the good government' of the railways and harbours, 'and the maintenance of order thereon and therein'. These regulations provide penalties for any contravention thereof and include fines up to £50 and imprisonment up to six months. Any contravention of a regulation by a servant of the administration may be deemed to be misconduct and may be severely punished either by the law courts or by the administration. The act also creates other specific duties, and provides penalties for their contravention. Station-masters, inspectors, ticket examiners, and other railway officials have the power of arresting persons contravening the provisions of the act or the regulations thereunder, but such arrested persons must be handed over to the police immediately to be dealt with according to law. Under the act a whole array of regulations has been framed controlling the actions of persons using the railways and harbours, entering railway stations to welcome arriving friends or to make inquiries regarding trains. These regulations have all the effects of law and are enforced in the ordinary courts of the country, but the regulations are not made by parliament but by officials of the administration, and are framed for the better management, control, and administra-

tion of the railways and harbours. In that they are created and framed by the railway administration and not by the legislature in the ordinary sense, they may be included in the term administrative law.

Under the Railways and Harbours Service Act, 1925, the governor-general, or some person to whom the authority has been delegated, may appoint so many persons as the service may require. The employment of all permanent members of the service is made secure by this statute, and servants of the administration may not be dismissed save under the provisions of the statute after an inquiry by an administrative tribunal.

The act especially lays down that any servant who is charged with misconduct shall be afforded an opportunity of being heard, and any admission or denial he may make or explanation he may give shall be considered by the officer delegated for that purpose.

A servant who is charged with misconduct of a serious nature may be suspended temporarily from duty. The order of suspension together with the charge on which the order was made shall be delivered in writing to the servant suspended. The servant must immediately state in writing in reply to the charge whether he admits or denies it or he may give an explanation.

When a servant is found guilty of misconduct, he may be fined, or his increments of pay be stopped, or his salary or wages or rank reduced, or he may be ordered to resign, or he may be dismissed. A servant found guilty of a criminal offence in a court of law is *ipso facto* dismissed; if found not guilty he may still be charged with misconduct by the administration.

If the servant denies the charge made against him, an inquiry must be held before an officer of the service. The servant is entitled to be present during the whole of this inquiry and must be afforded an opportunity of cross-examination, and of leading evidence, and he may have the assistance of another railway servant for the conduct of his defence or appeal.

If the servant is found guilty and considers the decision of his superior officer wrong, he may appeal to a tribunal called the Disciplinary Appeal Board for his district which may hear further evidence, and the appellant may be present and may cross-examine the witnesses.

The Disciplinary Appeal Board consists of one servant elected for two years from the class of servants to which the appellant

belongs and one servant nominated by the administration for two years. The decision of this board is communicated to a prescribed officer who reviews the case and gives his decision. If such decision is in accordance with a unanimous decision of the board, it becomes a final decision. If the board has differed, the accused may appeal to the general manager, and if dissatisfied with his decision, he may request the general-manager to forward the records of the case to the railway board for review.

Once the servant has exhausted the avenues of appeal allowed by the act, he has no further redress. Except in the circumstances referred to hereafter, he may not appeal to the courts of law.

*The Public Service.*<sup>1</sup> Misconduct by a servant in the public service consists of disobedience to the lawful orders of a superior, negligence or indolence in the discharge of duties, inefficiency or incompetency from causes within an offender's own control, public criticism of the administration, taking part in politics either actively or by merely belonging to a political party, disgraceful behaviour or gross discourtesy in the discharge of duties, intoxication, prodigality resulting in pecuniary embarrassment to the prejudice of the faithful performance of his duties, the disclosing of information otherwise than in the discharge of his duties, the acceptance of a private reward for service, the misappropriation of public money, the commission of a criminal offence, and the absenting himself without cause from his duty.

Any officer of the public service who is charged with misconduct not of a serious character, shall be required to transmit in writing within the time specified in the charge a statement of admission or denial or an explanation in writing. If the charge is denied, the officer charged may be heard in his defence. If he is found guilty, either on his admission or explanation, or after being heard, he may be fined up to five pounds.

The preliminary procedure is the same in the case of misconduct of a serious nature. If the charge is denied an inquiry must be held and evidence produced before a person delegated for such purpose by the Public Service Commission. The finding, on this inquiry, is final, but the finding must be transmitted to

<sup>1</sup> See Public Service and Pensions Act, No. 27 of 1923.

the minister of the interior or the administrator of the province, as the case may be, with a recommendation of the action to be taken. The offender may be discharged, fined, or reduced in grade.

*Mines and Works Act, 1911.* Under this act the governor-general has made regulations for the proper working and management of all mines, works, and machinery, and 'for better carrying out the objects and purposes of this Act'. These regulations prescribe penalties for any contravention thereof. As though it were not sufficient to have the law made by government officials, the act gives the manager of a mine power to make special rules for the maintenance of order or discipline and the prevention of accidents in any such mine. The rules, when made, are submitted through an inspector of mines to the government mining engineer who sends them to the minister of mines for his approval. When approved by him, and to the extent approved, they are posted at a conspicuous place at the mine for fourteen clear days, and then have the force of law.

An inspector of mines, machinery, or explosives, may try any breach of a regulation or of any manager-made rule and may impose a fine not exceeding five pounds which may be deducted from the employee's wages. This trial does have the semblance of a trial in an ordinary court. The evidence has to be taken down in writing, an oath has to be administered to witnesses, who are liable under the law of perjury for false evidence, and witnesses have the same privileges in respect of answering questions or producing documents as they have in an ordinary court of law. An appeal from the inspector's finding lies to the magistrate of the district, and the magistrate's decision is final.

*Miners' Phthisis Acts.* The Miners' Phthisis Board as at present constituted was established<sup>1</sup> by Act No. 35 of 1925, and consists of a chairman and not less than three nor more than six other members, each of whom is appointed by reason of his special knowledge of the intricate subjects dealt with by the board. The board sits at least once a week, and in its semi-judicial capacity decides upon claims by miners for compensation for having contracted phthisis. The board, for the purpose of deciding claims, may summons witnesses and administer an oath. Regulations governing the board's duties are made by the minister of mines after consultation with the board.

<sup>1</sup> See Acts No. 34 of 1911 and No. 40 of 1910.

*Motor Carrier Transportation Act, 1930.* This act empowers the governor-general to appoint a road transportation board consisting of three members, and local transportation boards, also consisting of three members. It is the function and duty of these boards to investigate any matter relating to motor carrier transportation and to submit recommendations to the minister of railways, to determine the volume and nature of motor carrier transportation over any proclaimed route, to receive and consider applications for motor carrier certificates over any route, and in its discretion to grant or refuse such applications, or to suspend or revoke certificates given. The decisions of local boards are subject to appeal to the road transportation board.

These road boards have been established in order to restrict the competition which road motor transport has set up against the railways of the Union. The railways in South Africa are state owned, and every effort is being made by the government to prevent the railways running at a loss. (One method of dealing with the problem has been by establishing road boards, consisting of members appointed by the government to protect the government's interests by refusing certificates for motor transportation). The members of the road boards may be dismissed by the government without the government being required to give any cause or reason for the dismissal. The powers of the board are such that they can entirely crush private competition against the railways; the penalties which the law imposes for contraventions of the act are fines up to one hundred pounds and imprisonment up to six months.

*Immigrants' Regulation Acts.* Under the Act of 1913, the governor-general appointed certain immigration boards for the summary determination of appeals by persons who, seeking to enter or being found within the Union, have been detained, restricted or arrested as prohibited immigrants. Each board has jurisdiction in respect of certain ports of entry. The board consists of three members, its chairman is a magistrate, and each member is appointed for a year. The hearing of an appeal against an immigration officer's decision is conducted in the presence of the appellant, who may be represented by legal advisers. The board may summon witnesses to give evidence under oath and to produce documents. The evidence must be taken down in writing, and the majority decision of the board

is final and conclusive. No court of law in the Union, it is specially stated, has jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act, or order of a board or the minister in relation to the restriction, detention or removal from the Union of a person dealt with as a prohibited immigrant. But an immigration board has to reserve any question of law which arises, at the request of the parties, for the opinion of the provincial division of the supreme court on a stated case, and this opinion may be taken to the appellate division. On the facts, however, as stated above, there is no appeal or review whatsoever.

## 2. Judicial Control over Administrative Tribunals <sup>1</sup>

The exact nature and extent of the discretion exercised by an administrative body depend on the empowering statute, and from this point of view the law by which these bodies are governed is merely part of the ordinary law of the land. The courts may not question the validity of the empowering acts of parliament, but they may question both the validity of the regulations made under these acts, and the validity of the methods by which the administrative bodies exercise their powers. Regulations must not go beyond the limits of authority granted by the empowering acts; and the methods of administrative bodies must not be 'star chamber' methods. They have to conform to certain principles, not patent on the face of the empowering statutes, which the judges of the superior courts have either by a process of interpretation read into the empowering statutes or, by reason of their inherent jurisdiction, have themselves assumed in order to prevent injustice.

The immigration boards, to which we have referred, have in some respects the appearance of courts of inferior jurisdiction, but they are nevertheless very different from courts of law, for the act under which they are established especially lays down that 'no court of law in the Union shall, except upon a question of law reserved by a Board . . . have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act or order, . . . of a Board. . . .' These are very strong

<sup>1</sup> See A. Lourie, 'Administrative Law in South Africa' (*South African Law Journal*, 1927, pp. 10 ff.).

provisions and the courts have no option and must act (or refrain from acting) accordingly.<sup>1</sup>

The above provisions go farther than do other acts of this type. But even in the absence of such express prohibition, it is nevertheless held implicit in any statute that hands over a matter to the determination of any person or body of persons that the decision given by them shall be final and not subject to appeal. In *Shadiack v. Union Government*<sup>2</sup> this rule is clearly stated: 'It is settled law that where a matter is left to the discretion or the determination of a public official and where his discretion has been bona fide expressed, the court will not interfere with the result. If he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law to make him change his mind or to substitute its conclusions for his own.' This is true also where an official body has reached a wrong decision on the merits, by its misconception of the facts of the case.<sup>3</sup>

There are, however, certain qualifying rules that have application to the decisions of administrative tribunals. In the first place, an administrative tribunal must act strictly within the scope of its delegated powers; in the second place, it must act in good faith; in the third place, its method of acting or its procedure must not be irregular. Each of these qualifying rules requires explanation.

*Jurisdiction.* It is the duty of a court to determine in accordance with the established rules of construction the meaning of an empowering enactment. The courts will not read a greater *delegation of power into the statute than they can help*. 'Where Parliament takes away the right of an aggrieved person to apply to the only authority which can investigate, and where necessary, redress his grievance, it should do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what is *prima facie* their duty, viz. from investigating cases of alleged injustice or illegality.'<sup>4</sup>

<sup>1</sup> See *Union Government v. Fakir*, [1923] A.D. 406; *Narainsamy v. Principal Immigration Officer*, [1923] A.D. 673.

<sup>2</sup> [1912] A.D. 642.

<sup>3</sup> *Doyle v. Shenker*, [1915] A.D. 233; *Hawken v. Miners' Phthisis Board*, [1920] W.L.D. 93.

<sup>4</sup> *Per Innes C.J. in Rex v. Padsha*, [1923] A.D. 281.

Where a statute gave the governor-general power to make regulations for the licensing of jewellers, and he made a regulation which provided that no jeweller's permit or renewal thereof shall be issued unless the commissioner of police certified that the applicant was a fit and proper person to hold such a permit, it was held that in the absence of direct statutory provisions it was not reasonable to suppose that the legislature contemplated entrusting the fortunes and businesses of a large number of persons to the absolute discretion of an individual, without their having an appeal or being able to know on what ground objection is taken to them. If it had intended to confer such a power, the legislature would have said so. This delegation of power to the commissioner of police was not incidental and necessary to the original or main power, and therefore it was held that the powers conferred by the statute had been exceeded and the regulation in question was *ultra vires*.<sup>1</sup>

Enactments delegating powers to individuals or administrative tribunals must be strictly construed. If an act provides that a departmental inquiry into a charge against a civil servant shall be ordered by the head of a department, and it is in fact ordered by the assistant general-manager, the whole proceeding is invalidated;<sup>2</sup> and if an education test is to be to the satisfaction of the minister, it must be to his satisfaction and not to that of an immigration officer.<sup>3</sup>

The meaning of a statute having been determined, the regulations under that statute must be strictly according to that meaning and strictly within the scope of that meaning. If the regulations themselves are valid, the administrative body has to act within the limits prescribed by the regulations. If the act and regulations lay down principles in accordance with which a discretion is to be exercised, extraneous matters must not be taken into consideration. For example, when a minister is empowered to make regulations for the prevention of stock disease, he must not use those powers to inflict such a punishment as would be a warning to other persons. This was exceeding the powers granted him,<sup>4</sup> for he was taking into

<sup>1</sup> *Keen v. Commissioner of Police*, [1914] T.P.D. 398.

<sup>2</sup> *Guildford v. Minister of Railways and Harbours*, [1920] C.P.D. 606; and see *Bradshaw v. Union Government*, [1930] N.P.D. 324.

<sup>3</sup> *Shadiack v. Union Government*, [1912] A.C. 642.

<sup>4</sup> *Struben v. Minister of Agriculture*, [1910] T.P.D. 903.



consideration a matter which he was not entitled to take into consideration. Powers to prevent a disease cannot be used as a means of punishment. Similarly, the consideration of colour is not one which a statute ordinarily contemplates should be exercised by a body with delegated powers unless the empowering statute grants this power.<sup>1</sup>

Under the power of testing the jurisdiction of an administrative body, falls the incidental power of testing the facts upon which the jurisdiction rests. A person born in the Union may not be deported. If an applicant claims he was born in the Union, and the immigration officer rejects that claim, the court has power to correct a decision that would have as its result the exclusion of the court's jurisdiction. The immigration officer has no jurisdiction over a person born in the Union, and however strongly he may decide that the person in question is not born in the Union, if in fact he is so born, no decision of the immigration officer can change that fact. If, however, the court decides that the person in question is not born in the Union, it cannot interfere with the immigration officer's decision.<sup>2</sup>

*Good Faith.* Any one who is given power to decide anything must listen to and consider both sides of the question. The courts presume that administrative bodies act fairly and impartially.<sup>3</sup> They must not act arbitrarily, capriciously, unreasonably or in bad faith.<sup>4</sup> If any one of these is proved as a fact, the supreme court will set aside the decision of an administrative body arrived at in an arbitrary, capricious or unfair manner.

*Procedure.* Where a statute provides the procedure to be

<sup>1</sup> *Swarts v. Pretoria Municipality*, [1920] T.P.D. 187. Under the Immigrants' Regulations Act, 1913, any person or class of persons may on economic grounds or on account of standard or habit of life be deemed a prohibited immigrant. In *Rex v. Padsha*, [1923] A.D. 281, it was held that a notice deeming every Asiatic an unsuitable immigrant on economic grounds was good, as in view of the peculiar economic conditions of the Union the notice was not so unreasonable as to justify the court in doubting that economic and not racial considerations were the basis of the minister's decision.

<sup>2</sup> *Principal Immigration Officer v. Narainsamy*, [1916] T.P.D. 274.

<sup>3</sup> A refusal to give reasons for the decision might be an important element in deciding whether there has been good faith, though administrative bodies are not compellable to give reasons; they should, however, state why reasons are not given (*Judes v. Registrar of Mining Rights*, [1921] T.P.D. 1046; *Jaffer v. Parow Village Board*, [1920] C.P.D. 267; *Stewart v. Witwatersrand Licensing Court*, [1914] T.P.D. 178; *Jaffer v. Wynberg Municipality*, [1915] C.P.D. 155).

<sup>4</sup> *Garrett v. Albany Licensing Court*, [1918] E.D.L. 128.

followed, the statutory body is bound to follow such procedure strictly, and the court will set aside proceedings in which there has been any departure therefrom.<sup>1</sup>

Review of the procedure adopted is very different from reviewing the decision arrived at. Setting aside a decision by means of an application to the supreme court on grounds of jurisdiction, bad faith, or irregular procedure, is not a process to declare a decision wrong, but a process to set aside a proceeding which the legislature does not authorize. In the case of wrong procedure, even though the court will not go into the correctness of the decision, it will nevertheless set aside the proceedings on the ground that it is the duty of the supreme court to prevent a course which *might* have led to injustice. Administrative bodies, even where no particular procedure is prescribed, should acquaint the defendant with the nature of the charge he has to meet. He 'must be given a fair opportunity to make any relevant statement which he may desire to bring forward, and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice'.<sup>2</sup> Unless the statute so directs, it is within an administrative body's power to refuse to allow legal representation,<sup>3</sup> or to insist upon all the evidence being in writing only.<sup>4</sup> The ordinary rules of evidence have no application before administrative tribunals. They may take into consideration their own knowledge. Here, perhaps, these bodies are most useful. They can quickly dispose of technical matters with which they are acquainted.

The great disadvantage of administrative inquiry and decision is the danger of injustice, not by reason of bad faith, but by reason of lack of judicial-mindedness and absolute independence. The individual citizen does not feel and in fact is not safe and secure in his rights under bureaucracy. The whole question has become a very serious one, especially in view of the increasing powers of administrative tribunals and the existence of the legal principle that the individual has no power of redress for a wrong

<sup>1</sup> e.g. failure to comply with a statutory requirement as to the giving of a notice (*Hopetown Licensing Court v. Hyman*, [1924] C.P.D. 8).

<sup>2</sup> *De Vertuël v. Knaggs*, [1918] A.C. 579, quoted in *Ross's Case*, [1920] T.P.D. 1.

<sup>3</sup> *Dalner v. S.A.R.*, [1920] A.D. 583.

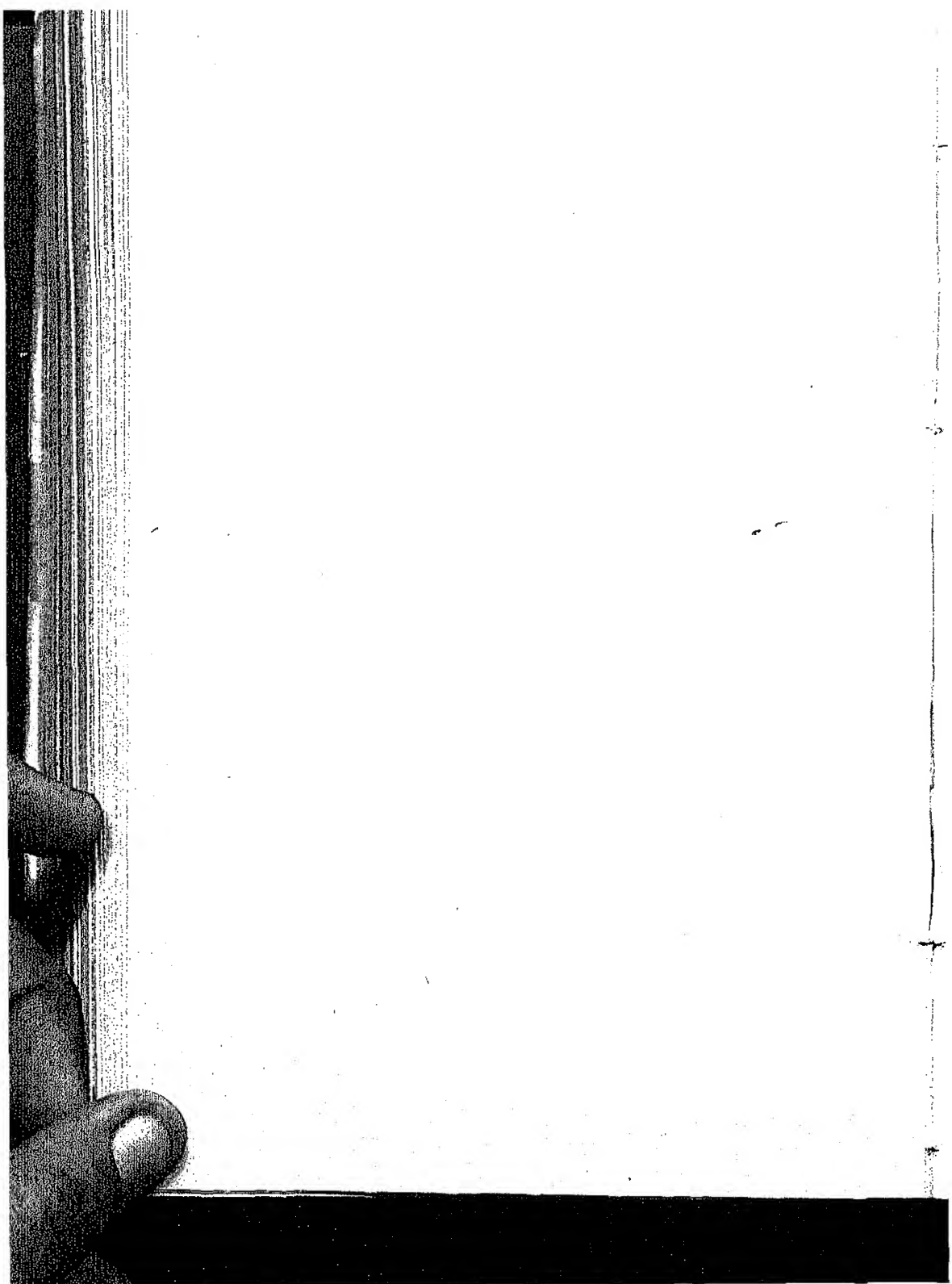
<sup>4</sup> *Porter v. Union Government*, [1919] T.P.D. 234; *Barlin v. Cape Licensing Court*, [1924] A.D. 472; *Fernandez v. South African Railways and Harbours*, [1926] A.D. 60.

bona fide done to him by an administrative body acting in a semi-judicial capacity. He cannot sue for damages, cannot even recover costs unless he can prove *mala fides*. The official is protected by the law; he stands in a special position as against the ordinary citizen.<sup>1</sup>

The truth is that the complications of modern life have necessitated and indeed accelerated the creation and growth of administrative tribunals. That they have come to stay—and that in increasing numbers—it is impossible to deny. On the other hand, no system of jurisprudence has been worked out in South Africa in connexion with them as has been done in France. The dangers, then, lie not in the tribunals themselves, but in the possibility of injustice and arbitrary action under them. Even though it might be impossible to prove that this has taken place, yet the system is so divorced from the general rule of law that there is need for the utmost care on the part of parliament in granting administrative powers and in making provisions for reasonable and adequate judicial review. The system is almost in its infancy in South Africa; and there is therefore opportunity for a thorough examination of its methods and implications.

<sup>1</sup> For the attitude of the courts to administrative law in Canada, see W. P. M. Kennedy, 'Aspects of Canadian Administrative Law', in the *Juridical Review*, Sept. 1934.

PART VI  
THE RULE OF LAW



## XX

### THE RIGHT TO PERSONAL FREEDOM

No man may be arrested or imprisoned except in due course of law. The legal means for the enforcement of this principle are (i) by means of an action for damages, and (ii) deliverance from unlawful imprisonment.

#### 1. Redress for Wrongful Arrest

If a person is wrongfully arrested, he may institute proceedings for the damage inflicted upon him. No matter if he be imprisoned for five days or five minutes his remedy still lies. This is the action for false imprisonment. False imprisonment is the wrongful act of imprisoning, or restraining the liberty of, any person without legal warrant or writ or other legal authority. It is not essential in an action for damages by reason of false imprisonment that the defendant shall have acted maliciously. The mere false imprisonment or illegal arrest is by itself sufficient. The illegal arrest or detention complained of must have been made by or at the instance of the defendant, and the fact that he made a bona fide mistake is no excuse if he did not act according to law. This means that every wrongdoer is individually responsible for every unlawful or wrongful act in which he takes part, nor can he plead in his defence that he did it at the instigation of some one else or the order of a superior.

Wrongs, it is readily seen, may be inflicted either by way of legal proceedings or without legal proceedings. For the latter there is the action of false imprisonment or assault or defamation and the like. But where a person maliciously and without reasonable or probable cause lays a false criminal charge against any one which has led to the prosecution of the latter, even though he be acquitted after a long or short trial, such person is liable in damages, and the principle of law in this, as in the former instances, though the phrase is not used in any of the many decisions upon which these propositions are based, is the individual's right to personal freedom, and so much so is this the case that even a malicious threatening of such right is subject to an action for damages.

But even this right of redress is in law insufficient security for personal freedom. So jealous is the law of the right to personal freedom, that, in addition to punishing every kind of wrongful interference with a man's liberty, it provides adequate security that every one who without legal justification is placed in confinement shall be able to get free. This security is provided by what is known in the United Kingdom as the writ of *habeas corpus* and in South Africa as the writ *de homine libero exhibendo*.

## 2. The Writ of *habeas corpus* or *de homine libero exhibendo*

The object of this writ is that the person detained may be produced before the court where his detention must be justified by the person detaining him. The writ *de homine libero exhibendo* corresponds very nearly to the English writ of *habeas corpus*. The one was to be found in the principles of Roman-Dutch law, when introduced into South Africa, the other in the common law and parliamentary enactments of England. While the provisions of law in regard to the former writ are still fully applicable, they have been amplified by the principles relating to *habeas corpus*. It has been laid down by the courts of South Africa that the rights to personal liberty which South Africans enjoy are substantially the same as those which are possessed by Englishmen, and that it is the bounden duty of the court (and it has inherent jurisdiction) to protect personal liberty wherever it is illegally infringed.<sup>1</sup> From the frequency in which the term *habeas corpus* has been used in our courts and not that of *de homine libero exhibendo* and from the fact that the courts have decided that the principles of *habeas corpus* are applicable in this country, the use of the Roman-Dutch term has fallen into disuse, and that of the English term has taken its place.

The procedure in the South African courts is by way of petition to the court setting out that a person within its jurisdiction has been wrongfully deprived of liberty, and the court issues a writ or order to have that person brought before the court and, if he has a right to liberty, the court sets him free. This order is directed against the person by whom a prisoner is alleged to be kept in confinement, to bring such prisoner before the court to let the court know on what ground the prisoner is

<sup>1</sup> *In re Kok and Balie*, Buch. 1870, p. 64. See Appendix II of this book.

being confined and thus to give the court the opportunity of dealing with the prisoner as the law may require.<sup>1</sup> The writ or order of the court can be addressed to any person whatever, be he an official, or a minister of the government, or the governor of a prison, or a private person, who has or is supposed to have another in custody. Any disobedience to the writ exposes the offender to summary punishment for contempt of court.

It is to be noticed that the Roman-Dutch law required that the detention be made *dolo malo* (with wrongful intent), and without just cause. This could obviously lead to injustice as the detention might be made with a bona fide belief as to its necessity. The modern practice derived from the principles of *habeas corpus* does not require wrongful intent. It is sufficient that the detention is wrongful or unjustifiable.

It is thus seen that no arbitrary power can be exercised by anybody within the Union. The law is not a respecter of persons. Where discretionary power is given, the law guards most jealously the rights to personal liberty. The supremacy of the law is not to be questioned. Nor does the law in this matter discriminate between foreigner and citizen, between race, creed or colour. An instructive and illuminating judgment<sup>2</sup> was given by the late Mr. Justice Mason in the Transvaal supreme court in 1906. A Chinese labourer, Li Kui Yu, was employed as a police sergeant at a certain mine-compound. Complaints were made in respect of the conduct of this Chinaman to a government official, the superintendent of the foreign labour department, to whom a request was made that this Chinaman should be repatriated. Acting upon that request and in terms of section 7 of the Labour Importation Amendment Ordinance of 1905, the superintendent had the Chinaman brought to his office, after he had been arrested and handcuffed, and he then confined him in a cellar. The compound-manager, noticing the absence of the Chinaman, consulted solicitors, and communicated with the superintendent, who replied that he intended repatriating the Chinaman under the Ordinance quoted. The compound-manager requested to see the Chinaman, but the

<sup>1</sup> It may happen that a prisoner lawfully arrested is detained for an excessive period without being brought to trial. In such cases the Criminal Procedure and Evidence Act, 1917, provides for the discharge of the prisoner.

<sup>2</sup> *Li Kui Yu v. Superintendent of Labour*, [1916] T.S. 181.



superintendent absolutely refused to allow him to have access to him. When the compound-manager asked to see the Chinaman for the purpose of getting a power of attorney, signed in order that the Chinaman might employ legal advisers, the superintendent refused. Before the matter came to court, the Chinaman was sent out of the province to Durban. The learned judge remarked :

'I quite recognize that the duties of the Foreign Labour Superintendent are very difficult and very responsible. Where enormous powers such as those contained in the Ordinance are conferred on any official, it is his duty to keep strictly within those powers. The court will see that laws of this kind are not stretched beyond the powers which they really give and are intended to give.

'In the first place the Chinaman was illegally arrested and illegally confined as if he were a prisoner. The provisions of the law with reference to the repatriation of labourers are clear. Under Section 7 of the Labour Importation Amendment Ordinance of 1907, "the Superintendent may . . . order the return to the country of origin . . . of any labourer who he has reasonable grounds for believing is a danger to the exercise of the proper control of labourers on any mine". I do not wish for one moment to suggest that the superintendent did not *bona fide* believe and that he had not very good grounds indeed for believing that this particular labourer was a danger to the exercise of the proper control of the labourers on the mine. But when an order under the Ordinance is given the Ordinance provides how it is to be carried out. Section 28 of Ordinance 17 of 1904 provides that if a labourer refuses to return to his country of origin he may be arrested without warrant and brought before a magistrate, who may punish him for refusing, and only after that punishment can he be forcibly sent back to his country of origin. The reason of that is perfectly clear. If any labourer has any *bona fide* complaint to make about the conduct of the officials, about his treatment or any other matter, he will have an opportunity when he comes before the magistrate to make that complaint and to obtain justice. One can see that a section of this kind is absolutely necessary to protect a labourer against being treated with the grossest injustice. His wages might be due, property of his might be in the country, and there are many conceivable circumstances under which he might have good grounds for objecting to return for the time being. Unless he can come before the Court the whole of those complaints are silenced, and the conduct of the officials can never be scrutinised, and he has no opportunity of getting justice.

'Next, the Superintendent was guilty of what was not perhaps intentionally but was in substance and in fact a tyrannical exercise of power—preventing anybody having access to the Chinaman. The only way of preventing a person being illegally done away with and illegally treated is to uphold to the fullest extent the right of every person to have any

of his friends come and see him who choose to do so. To prevent the access of friends to any person is a most serious infringement of the liberty of any subject. The Superintendent is told that the solicitors wanted to see this man for the purpose of taking instructions from him. It was even more serious for him to decline to allow the man to consult a solicitor or even to say whether he wished to see a solicitor. Even if the man had been a prisoner under legal confinement it would have been a very serious step to take to say that he would not be allowed to take any legal advice, to consult the person likely to help him, or take any steps in order to test whether his confinement or the steps proposed to be taken were legal. The Superintendent must take the consequences of that act of his.

'Lastly, where a person knows or has reason to believe or ought to know that an application is being made to the Court for a certain purpose, if he takes any action before the Court can be approached, the Court will regard that as an interference with the administration of justice, and will exercise its powers to prevent itself being defeated by anything of that kind.'<sup>1</sup>

The Chinaman was brought before the court and the superintendent was punished for contempt and ordered to pay the costs of the proceedings.

<sup>1</sup> This statement of the law was queried in *Yamamoto v. Athersuch and Another*, [1919] W.L.D. 105, as being too wide. There it was stated that 'wrongful intent is essential to the crime of contempt of court. Where an act is done with the intention of defeating the ends of justice or of obstructing the court in its functions, there is *dolus*, and the act is punishable as contempt of court, whether or not an order of the court is in existence.' See *Marechane's Case*, 1 S.A.R. 27; *Sigcau v. The Queen*, 12 S.C. 258.

## MARTIAL LAW AND ACTS OF INDEMNITY

IN the Union there can be no suspension of the Habeas Corpus Acts for the simple reason that the Union has no such acts. In a state of war or emergency a proclamation of martial law is made, and this proclamation has the effect of interrupting or suspending the ordinary functions of the courts in a proclaimed district in respect of the acts of the military or police authorities, and the courts will not interfere with those authorities in regard to acts done by them, e.g. in regard to persons arrested and confined to jail under military authority.

In the privy council case of *Marais v. Regina*,<sup>1</sup> the appellant had been arrested near Capetown and detained in custody under military authority during the Boer war. Cape Colony, it must be remembered, was a British colony and the area-around Capetown was comparatively peaceful. Marais petitioned the supreme court of the Cape of Good Hope for release on the ground that he had not committed a crime, or otherwise that he should have been arrested and tried according to the ordinary law as the ordinary courts were open. The privy council, refusing leave to appeal from the decision of the Cape court, held that where actual war is raging in the country, acts done by the military authorities are not justiciable by the ordinary tribunals. Martial law had been proclaimed over the district in which Marais had been arrested and in the district to which he had been removed, and in those districts the civil courts had no jurisdiction to call in question the propriety of the action of the military authorities.

It is not to be supposed that martial law proclamations have in any sense the force of law. They cannot of themselves impose upon any persons legal obligations or duties not imposed by common law or by acts of parliament. A proclamation of martial law is a notice to the public and to the courts of law that a state of war or emergency exists and that, therefore, the public must obey the military regulations and instructions and that no court of law must interfere with any acts done by the military until

<sup>1</sup> [1902] A.C. 109.

the proclamation of martial law is withdrawn or peace and order restored. The production of the proclamation of martial law to any judge who has not read it is *prima facie* evidence of the existence of a state of war and extreme emergency, though the fact that a state of war or emergency exists may be proved by other evidence as well. The courts, however, would take notice of the proclamation of martial law, and its production would be a complete answer to any action brought against the authorities. The court would immediately declare that it has no jurisdiction to interfere with the acts of the military authorities during a time of war or emergency.

An act of indemnity is something of an entirely different character.

'An act of indemnity,' says Dicey, 'though it is the legislation of illegality, is also, it should be noted, itself a law. It is something in its essential character, therefore, very different from the proclamation of martial law, the establishment of a state of siege or any other proceeding by which the executive government at its own will suspends the law of the land.' It is no doubt an exercise of arbitrary sovereign power, but where the legal sovereign is a parliamentary assembly, even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law.<sup>1</sup>

The nature of an act of indemnity, its recognition of the common law principle that every man is responsible for his own acts and cannot plead the orders of any one else in justification of wrongful acts committed, be he the governor-general or a cabinet minister, is best illustrated from Act No. 6 of 1922:

#### ACT

To provide for the withdrawal of martial law from operation in certain districts of the Transvaal; to indemnify the government, its officers and other persons in respect of acts advised, ordered or done in good faith in relation to measures taken for the prevention and suppression of disorder or disturbance, the maintenance of good order and public safety and in the administration of martial law; and further to enable special criminal courts constituted under the existing law to try certain classes of offences committed during the disturbances in those districts.

*(Assented to 13th May, 1922)*

*(Signed by the Governor-General in English)*

<sup>1</sup> A. V. Dicey, *Law of the Constitution* (London, 1915), appendix x.

*Preamble*

WHEREAS, in order that special precautions might be taken in certain districts of the Transvaal for the prevention and suppression of disorder and the maintenance of public safety, the Governor-General, with the advice of the Executive Council, did on the tenth day of March, 1922 by Proclamation No. 50 of 1922, place those districts under martial law as martial law is understood and administered in His Majesty's dominions.

AND WHEREAS it is desirable that martial law should now be withdrawn from operation in the said districts and that the government, its officers, and persons acting under them or upon their orders should be indemnified in respect of acts and things in good faith advised, commanded, ordered, directed or done for the purposes for which martial law was so proclaimed:

AND WHEREAS it is further desirable to make special provision whereby persons charged with certain classes of offences committed in the course of disturbances prior to and after the proclamation of martial law as aforesaid may be tried by special criminal courts constituted as in the Criminal Procedure and Evidence Act 1917 is provided for the trial of other similar offences:

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:

*Withdrawal of Martial Law*

1. As from the date of the promulgation of this Act in the *Gazette*, martial law is withdrawn from operation in every magisterial district which was placed under martial law by Proclamation No. 50 of 1922 and thereupon that Proclamation and any regulations, orders, and instructions issued under the authority of martial law and for the purposes of its administration shall, in respect of each such district, cease to be of force and effect.

*Indemnity of Government and its officers, &c.,  
for certain acts*

2. (1) No action, indictment, or any other legal proceeding whatever shall be brought or instituted in any court of law in the Union against—

- (a) His Royal Highness the Governor-General; or
- (b) any member of the Executive Council of the Union; or
- (c) any control officer or commissioned officer, as defined in the regulations published under government notice No. 428 of 1922; or
- (d) any person employed in the public service or the railways and harbours service or in the police forces or defence forces or in any special police force or in the prisons service of the Union; or
- (e) any person acting under, or by the direction or with approval of, any officer, member or person aforesaid in any position or capacity, civil or military,

for, or on account of, or in respect of, any act or thing whatsoever, in good faith advised, commanded, ordered, directed or done on or after the tenth day of March, 1922, and prior to the promulgation of this Act, for the purposes of preventing or suppressing disorder in any such district or to maintain good order and public safety therein, or before that date, if such act or thing were necessary in relation to the preparatory measures for the purposes aforesaid.

Any such action, indictment, or any other legal proceeding whatever which may have been commenced prior to the promulgation of this Act shall be discharged and shall become and be made void.

(2) Every such person as is described in sub-section (1) by whom any such act or thing has been in good faith advised, commanded, ordered, directed, or done, for the purposes in that sub-section described shall in respect thereof be freed, acquitted, discharged, released, and indemnified against all persons whomsoever.

(3) Every act or thing referred to in sub-section (1) shall be presumed to have been advised, commanded, ordered, directed, or done (as the case may be) in good faith or, as far as it concerns acts done prior to the tenth March, 1922, to have been necessary until the contrary is alleged and proved by the party complaining.

*Sentences pronounced and arrests made under Martial Law  
confirmed and rendered lawful*

3. (1) The several convictions obtained before and the sentences passed by magistrates under the jurisdiction conferred by the regulations published under Government notice No. 428 of 1922 or any amendment of those regulations for offences thereunder are hereby confirmed in so far as the same shall not have been set aside or reduced by or under the authority of the Minister of Defence; and every person undergoing such a sentence and confined to any prison, gaol, or lock-up or any other place whatsoever shall continue to be confined therein or elsewhere as the Minister of Justice may direct, until the expiration of the sentence or until released by the Governor-General in the exercise by him of the Royal mercy, or until otherwise discharged under lawful authority. Every such conviction and sentence shall be deemed for all purposes to be a conviction and sentence of a duly and legally constituted court of law in the Transvaal, shall be carried out accordingly, and shall have the same consequences and effect.

(2) Every person who, during the existence of martial law has in good faith and upon the authority of a control officer or commissioned officer (as defined in the said regulations) been arrested or committed to or detained in any prison, gaol, or lock-up or in any other place whatsoever in respect of an alleged criminal offence (whether statutory, or at common law or against the regulations aforesaid) shall be deemed to have been as lawfully arrested, committed, or detained as if the arrest, committal, or detention had been under a warrant or order issued in accordance with law.

(3) Every recognizance taken during the existence of martial law upon which a person accused of any offence mentioned in sub-section (2) has been admitted to bail shall be and is hereby declared to be in full force and effect.

*Certain offences which may be tried before special criminal courts constituted under Act No. 31 of 1917*

4. If the Attorney-General of the Transvaal, upon a consideration of any preparatory examination where an accused person has been committed for trial, decides to indict such person upon a charge of murder, or assault with intent to commit murder or assault with intent to do grievous bodily harm, or arson, or malicious injury to property, and states in writing to the Minister of Justice that the act alleged to constitute such offence appears to have been committed in one of the districts which was placed under martial law as aforesaid and appears also to have been committed in connexion with the disorder hereinbefore referred to or in connexion with the industrial dispute from which such disorder arose, the Governor-General may constitute a special criminal court to try such offence referred to in section two hundred and fifteen of, and specified in the second Schedule to, the Criminal Procedure and Evidence Act, 1917, and the provisions of that Act relating to trials by a superior court shall in all respects apply to the trial of any such offence.

*Short Title*

5. This Act may be cited for all purposes as the Indemnity and Trial of Offenders Act, 1922.

It must be noticed, first, that martial law is withdrawn by the act of parliament providing the indemnity so that there is no period of time allowed to exist between the withdrawal of martial law and the passing of an act of indemnity during which aggrieved persons could institute proceedings for false imprisonment or other wrongful acts. Secondly, the preamble recognizes martial law only as it is 'understood and administered in His Majesty's dominions'. Thirdly, the government, its officers and persons acting under them or upon their orders, are indemnified in respect of acts done in good faith and for the purpose for which martial law was proclaimed, that is, for the prevention and suppression of disorder and the maintenance of public safety. So that any person who wantonly and in bad faith commits a wrongful and illegal act such as an assault upon an officer of the crown or a soldier carrying out government instructions, or who commits highway robbery (all of which acts would

obviously not fall under the phrase 'done for the purposes for which martial law was so proclaimed'), would be liable under the ordinary criminal and civil law. Fourthly, sentences of imprisonment imposed during martial law are confirmed. Lastly, it is to be noted that even the governor-general and the members of the executive council, as also persons acting under the direction or with the approval of the authorities, are indemnified under the act, an illustration of the principle that all persons are subject to and under the law.

There is an essential legal distinction between acts done in good faith to suppress rebellion or maintain order though those acts were not strictly necessary, and strictly necessary acts so done. In the language of Dicey, 'a general is entitled to use any land which he requires for the purpose of military operations. It is again his right, and indeed his duty, when the necessity arises, to inflict instant punishment upon, and even, if need be, put to death, persons aiding and abetting the enemy. It is indeed difficult to picture to oneself any legitimate warlike operation or measure which, while war is raging in England, a general cannot carry out without any breach of the law whatever.'<sup>1</sup> The principle upon which a general acts in circumstances such as these is the maintenance or restoration of order and the safety of the realm. His acts are usually justified by strict necessity. If he allows a civil court to remain open it is to allow it jurisdiction in matters which do not affect his main endeavour to maintain order or restore peace. By the strict necessity of the situation he takes upon himself and his officers and military courts the duty of maintaining order. Acts done by him in such circumstances are protected by the ordinary common law by reason of their strict necessity. Any person whatsoever who does an act with the object of preventing riots, murder, or arson, if that act were strictly necessary, is protected under the common law. But it is not always certain that acts done by the authorities in good faith are strictly necessary. To a jury, *ex post facto*, such acts may appear in a different light. Therefore, again using the words of Dicey, 'whenever, at periods of national danger, a breach of law is demanded . . . by considerations of political expediency, the law breaker whether he be a general or any other servant of the Crown, who acts *bona fide* and solely

<sup>1</sup> A. V. Dicey, *Law of the Constitution*, Appendix X,



with a view to the public interest, may confidently count on the protection of an act of indemnity.<sup>1</sup>

This, then, is the chief object of an act of indemnity: to protect acts done in good faith though they were not strictly necessary. Strictly necessary actions are protected by common law, but acts not strictly necessary, when done in good faith and in times of extreme national emergency certainly merit protection. It is in order to protect such acts, to quieten doubts and to legalize any sentence of imprisonment imposed during the existence of martial law, that an act of indemnity is required.

<sup>1</sup> A. V. Dicey, *Law of the Constitution*, Appendix X.

## DEPARTURES FROM THE RULE OF LAW

DICEY, in his *Law of the Constitution*, remarks that 'two features have at all times since the Norman Conquest characterised the political institutions of England. The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. . . . The second of these features, which is closely connected with the first, is the rule or supremacy of law.' The same features, generally, may be said to be true of the political institutions of South Africa. With the first we have already dealt. The second provides some interesting data for ethical comment.

Explaining what he means by the 'rule of law', Dicey says:

'(i) We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

'(ii) We mean, in the second place, when we speak of the "rule of law", as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals.'

It is our intention to discuss various aspects of South African legislation in their relation to the features of British constitutional law as outlined by Dicey when dealing with the principles underlying the use of the phrase 'the rule of law'. In doing so, we shall confine ourselves to a discussion of the following propositions:

- (1) A person residing within the Union may lawfully be punished without any trial before the courts.
- (2) A person residing within the Union may lawfully be punished by a court which is not an ordinary court of the country, but a special court, specially constituted to try a particular person for a particular offence.

PROPOSITION I: *A person residing within the Union may lawfully be punished without any trial before the courts.*

As a result of the industrial disturbances in South Africa in 1913, the riotous assemblies laws were amended and codified

in the Riotous Assemblies and Criminal Law Amendment Act, No. 27 of 1914. Intended at first to deal only with industrial disturbances, it was amplified and amended to deal with the relationship between the black and white races of South Africa by the Riotous Assemblies Amendment Act, No. 19 of 1930, and the Native Administration Act, No. 38 of 1927.

The first section of the Riotous Assemblies Act, 1914, provides that whenever a magistrate acting under special authority of the minister of justice has reason to apprehend that the public peace would be seriously endangered by the assembly of a particular public gathering in any public place, he may prohibit the assembly of that public gathering in any public place in his district either by publication or by oral public announcement. Any person who thereafter takes part in such a prohibited public meeting, either by speaking or listening or remaining at that public place, may be arrested and punished, and the meeting may be dispersed by the police, who, as a last resource may use fire-arms.

The Act of 1930 amplified this section by adding the following subsections:

(12) Whenever the Minister is satisfied that any person is in any area promoting feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand, he may by notice under his hand, addressed and delivered or tendered to such person prohibit him, after a period stated in such notice, being not less than seven days from the date of such delivery or tender, and during a period likewise stated therein, from being within any area defined in such notice. . . .

(13) If any person to whom a notice has been delivered or tendered under sub-section (12) requests the Minister in writing to furnish him with the reasons for such notice, and with a statement of the information which induced the Minister to issue such notice, the Minister shall furnish such person with a statement in writing setting forth his reasons for such notice and so much of the information which induced the Minister to issue such notice as can, in his opinion, be disclosed without detriment to public policy.

(14) Subject to the proviso to sub-section (12) any person who contravenes or fails to comply with any notice delivered or tendered to him in terms of sub-section (12) shall be guilty of an offence and liable on conviction to the penalties provided in sub-section 2) and he may at any time after the expiration of the period of

not less than seven days stated in such notice be removed by any member of the police force duly authorized in writing by any commissioned police officer from any area wherein he is prohibited to be in terms of sub-section (12).

- (15) Whenever any person who has received a notice in terms of sub-section (12) is necessarily put to any expense in order to comply with such notice, the Minister may in his discretion cause such expense, or any part thereof, to be defrayed, out of public funds and may, further, in his discretion, cause to be paid out of such funds to such person a reasonable subsistence allowance during any period whilst such notice applies to him.

It is in subsection (14) that the departure from the rule of law as understood by Dicey is seen. A person may be removed out of a district or even a province without any trial whatsoever.<sup>1</sup> He has no redress at all. It is true that a person may be charged and convicted for failing to obey the minister's order, but the only purpose of such conviction would be extra punishment or deportation out of the country under subsection (16), and not for purposes of removal out of the district, for subsection (14) gives the minister such right of removal without any conviction. Dicey's first principle is violated because 'a man is punishable or can be lawfully made to suffer in body or goods without a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'. Under this act a man has no trial at all; he cannot claim to be heard in self-defence.

The Riotous Assemblies (Amendment) Act, 1930, introduces into South African constitutional law certain provisions somewhat related to what is known as the press law of certain European countries. Writing in 1886, Dicey stated: 'In France, literature has for centuries been considered as the particular concern of the State. The prevailing doctrine, as may be gathered from the current of French legislation, has been, and still to a certain extent is, that it is the function of the administration not only to punish defamation, slander, or blasphemy, but to guide the course of opinion, or at any rate to adopt preventive measures for guarding against the propagation in print of unsound or dangerous doctrines.'<sup>2</sup> The press laws went much farther than the attempt to prevent the publication of seditious literature, a restriction which exists also in South Africa and in

<sup>1</sup> Cf. the provisions of the Natal Native Code, *supra*, Chapter I. 2 (vi); *infra*, Chapter XXV. 1.

<sup>2</sup> *Law of the Constitution* (London, 1915), p. 250.

the United Kingdom. They were a genuine attempt to control the expression of opinion. In some European countries it is a punishable offence, and a ground for the suspension of the publication of a newspaper, to print articles which may engender ill feeling between sections of the community. It is this latter aspect of the press laws which have appeared in South Africa.

Section 1 of the Riotous Assemblies (Amendment) Act, 1930, adds the following subsections to Section 1 of Act No. 27 of 1914:

- (7) Whenever the Governor-General is of opinion that the publication or other dissemination of any documentary information (as defined in sub-section (11) is calculated to engender feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand, he may by a notice published in the *Gazette* and in any newspaper circulating in the area where the said documentary information is made available to the public, prohibit any publication or other dissemination thereof.
- (9) Any person affected by a prohibition under sub-section (7) may, within fourteen days after the first publication of the notice containing such prohibition, apply to the provincial or local division of the supreme court having jurisdiction within the areas referred to in sub-section (7) to set such prohibition aside, and if he proves to the satisfaction of such division that the documentary information to which such prohibition applies is not of such a nature that the natural and probable result of its publication or other dissemination will be to engender feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand, such Division may set such prohibition aside.

Closely akin to the provisions of the law set out above, are the provisions of the Native Administration Act, No. 38 of 1927. Section 29 lays down that:

- (1) Any person who utters any words or does any other act or thing whatever with intent to promote any feeling of hostility between Natives and Europeans shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding one year or to a fine of one hundred pounds, or both.
- (2) If it appears to a Magistrate on information made on oath that there are reasonable grounds for suspecting that there is upon any premises within his jurisdiction—
  - (a) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

- (b) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence,

he may issue his warrant directing a policeman or policemen named therein or all policemen to search such premises and to seize any such thing if found and take it before a magistrate. If any magistrate before whom any such case is brought is satisfied that it is anything which may reasonably be calculated to cause or promote any feeling of hostility between Natives and Europeans he may by writing authorise the destruction thereof or its confiscation to the Crown but no such order shall be carried into effect until a period of one month has elapsed after the date of such order and the decision of the magistrate in that behalf shall be subject to review.

- (3) The Governor-General may order that, during a period specified in the order, a person convicted under sub-section (1)—

(a) if he is not a Native, and if the offence was committed in any area included in the Schedule to the Natives Land Act, 1913 (Act No. 27 of 1913), or any amendment thereof, shall not enter or be in any such area; or

(b) if he is a Native, and if the offence was committed outside any such area, shall not enter or be in any place outside any such area.

A conviction for a contravention of any of the provisions of section 1 of the Riotous Assemblies (Amendment) Act or of section 29 of the Native Administration Act, 1927, renders the offender, if not born within the Union, liable to deportation.

We see from the above that there exist side by side in South Africa legal provisions of two kinds for the prevention of the dissemination of written or spoken opinions or statements which may be calculated to cause feelings of hostility between the Europeans and the natives. The prevention of these prohibited doctrines may be enforced either by a court of law or by the executive government without recourse to a court of law. In the latter case we have a departure from Dicey's first illustration of his conception of the rule of law, that no man may be punished without proof of a breach of law in the ordinary courts of the country. In itself, this departure is not a breach of the rule of law, for the law itself (which is a law created by the supreme legislature and illustrates the sovereignty of parliament) empowers and authorizes the minister of justice to act without first bringing the alleged offender before a court of law. This, possibly, is not a very serious departure from Dicey's rule of law, or rather from a conception of what the rule of law should

be, but it nevertheless is an illustration of the tendency to that effect in South African enactments.

PROPOSITION II: *A person residing within the Union may lawfully be punished by a court which is not an ordinary court of the country, but a special court, specially constituted to try a particular person for a particular offence.*

There are certain kinds of offences for which the offenders may be brought before special courts. Juvenile offenders are brought before a juvenile court, certain native offences are tried before certain native courts, and certain administrative offences in the public services are punished by administrative courts. But all the above courts, to use a wide enough description, are permanent courts functioning continuously or from time to time, with regularly appointed officers. There exists in South Africa, however, another kind of court, which, as its name implies, is a special criminal court. The Riotous Assemblies Act, 1914, created this special criminal court.

This act considered that there were certain offences, which, taken together with particular circumstances, made it inadvisable to have them tried before a jury. Contraventions of the law relating to riotous gatherings, the dissemination of seditious propaganda as described above, and contraventions of the law relating to the use of violence in industrial disputes, are not fit subjects, in the excited state of public feeling, to be brought before a jury for the reason that a sufficiently impartial jury may not be found. The attorney-general may inform the minister of justice that if an accused person were tried by a jury, the ends of justice may be defeated, and the governor-general may thereupon constitute a special criminal court to sit without a jury. This court consists of either two or three judges of the supreme court, whose decision shall be unanimous when there are two judges, or by a majority when there are three judges constituting the court. The court is created to sit at a specified time and place and to try certain specified offences; when its specified labours have been completed, it ceases to function. The fact that it has been created must be reported to parliament by the minister of justice.<sup>1</sup>

<sup>1</sup> See substantially the same provisions in section 4 of Act No. 6 of 1922 (murder, assault, arson, in a district where martial law has been proclaimed) and in

It is quite possible, in view of the conditions of the country and because juries in the country districts will not convict persons trapped under the diamond laws, that special courts will be set up to deal with such offences. These courts, however, will differ from the kind of special court which we have considered because they will have a permanent existence and will not be set up to try a particular offender or offenders for particular offences, and then cease their existence.

This departure from a conception of the rule of law is also not a very serious matter, and is given as an illustration of the steps taken by the government to deal with offences in times of tumult.<sup>1</sup>

section 215 of the Criminal Procedure and Evidence Act, 1917 (treason, sedition, public violence, offences against the laws for the prevention of illicit dealing in precious metals and stones, and the supply of liquor to natives and coloured persons).

<sup>1</sup> The two principles of Dicey, as quoted on p. 435, have been subjected within recent years to important criticisms. In this connexion, reference may be made *inter alia*, to W. Ivor Jennings, *The Law and the Constitution* (London, 1933), pp. 44-51, 205-210, 252-263.





PART VII  
THE GOVERNMENT OF THE NATIVES



## INTRODUCTION

WE have already dealt with the administration of justice as specifically affecting the native population and with the application of native law. We propose, in this part of the work, to discuss the executive administration of the native population which numbers about five and a half millions, to examine the extent to which local government has been granted to them, their system of land tenure and land administration as it affects them, and the manner in which they are taxed.

The most striking characteristic of legislation by the Union parliament is the differentiation, often most necessary, which is made between the European and the non-European races. It is impossible in a work dealing only with constitutional law to deal exhaustively with the many laws which discriminate against the native and coloured races. We can give only a few examples to show the nature of that discrimination. Most of these examples are not given in a spirit of criticism, for this is a legal and not a political work. But where glaring examples of injustice are disclosed, such as in the provisions of the Native Service Contract Act, 1932, attention is drawn to such injustices. At the same time, those who do not understand the native races of the Union and the problems created by the presence of a numerically predominant element in the population which is entirely different in habits of life and in the standard of living from the European population, should be extremely cautious in criticism. The vast majority of natives are still so backward in all the attributes of civilization, so easily influenced to mischief and agitation, so lacking in a sense of responsibility, that they may rightly be described as children who require not only the guidance of the European but often his firm direction in their own affairs.

In order to avoid confusion, it is well to explain in what sense the term 'non-European' is used in South Africa. There is constant use in South Africa of the terms 'non-Europeans', 'natives', 'coloured persons', and 'coloured races', and these terms need explanation. There have been a number of judicial definitions of the above expressions, but the best guide to their

meaning is to be found in the Natives Taxation and Development Act, No. 41 of 1925, and the Liquor Act, No. 30 of 1928. Using these statutory definitions as a basis, we may define the various terms as follows: 'native' means any member of an aboriginal race or tribe of Africa, and includes a Bushman, a Hottentot, and an American negro;<sup>1</sup> 'coloured person' means any person who is not entirely European or entirely native, and the term excludes an Asiatic but includes the class of persons known as Cape Malays;<sup>2</sup> 'coloured or non-European races' includes all persons who are not European or 'white'. The difference between a person classed as a 'coloured person' and one who is a member of the 'coloured races' is simply that the latter includes Indians, Chinese, Japanese, &c., whereas a 'coloured person', except for the inclusion of Cape Malays, does not include an Asiatic but refers particularly to the persons who are a mixture of European and native. Brand says, 'A coloured person is not a Kaffir. He is a person of mixed white and black blood. Coloured men vary in colour between all the shades which are not quite white or quite black.'

Now, in South Africa, there apply, in greater or less degree, certain statutory restrictions upon the liberty of all persons who are 'not quite white' or European, a certain differentiation of legal status which prevents them from enjoying the privileges ordinarily enjoyed by Europeans. As far as Asiatics are concerned, we may dismiss the topic by stating that generally speaking they have all the restrictions which the natives have, and very stringent provisions are contained in the law to prevent them from circumventing it. For example, Asiatics or companies which are controlled by Asiatics cannot own immovable property, and if any person holds shares or land in trust for Asiatics, he is liable to the heaviest penalties.<sup>3</sup>

<sup>1</sup> 'The best test of whether a person is an aboriginal native is appearance. A person whose general appearance is that of an aboriginal native must be held to be such despite traces of European blood' (*Rex v. Willett*, 10 S.C. 108; and see *Rex v. Parrott*, 16 S.C. 452).

<sup>2</sup> 'It is in the gradations of colour between black and white that difficulties may occur, but when once it is established that one of a man's nearest ancestors, whether male or female, was black like a negro or Kaffir, or yellow like a Bushman or Hottentot or Chinaman, he is regarded as being of other than European descent' (and therefore coloured) (*per de Villiers C.J. in Moller v. Keimoes School Committee*, [1911] A.D. at p. 643.)

<sup>3</sup> See Transvaal Asiatic Land Tenure Act, No. 35 of 1932.

We have already seen that natives are excluded from electoral privileges.<sup>1</sup> The next instance is their exclusion from liquor privileges. Under the Liquor Act of 1928 (except for certain exempted non-Europeans) only white persons may purchase, sell, consume or be in possession of intoxicating liquor. The third instance of non-equality under the law is to be found in the prohibition of any person save a European from owning land or residing in certain areas in the Union.<sup>2</sup> The fourth restriction upon the native population may be called a restriction upon their freedom of movement and is to be found in the Pass Laws and in the Natives (Urban) Areas Act, which are discussed in Chapter XXV. 2 (ii). Another impost upon natives will be found in the Native Service Contract Act, 1932.<sup>3</sup> Some of these restrictions are necessary not only for the good government of the whole population but also for the protection of the morals and health of the natives themselves. The natives are unaccustomed to the consumption of liquor, which not only makes them more irresponsible than it does Europeans and therefore more dangerous, but may easily, if unchecked, destroy the whole native population. They do not understand the proper use of fire-arms, and if natives were allowed to possess them, they would use them on the slightest provocation. They are not, generally, educated for electoral privileges, though in matters of local government which closely concern their daily lives, they show quite an aptitude with a little European guidance. However, they are under the laws peaceful and anxious to progress.

<sup>1</sup> See Chapter X. 2 (b) and Chapter XXIII. 1.

<sup>2</sup> See Chapter XXVI. 1.

<sup>3</sup> See Chapter XXV. 2 (iii).

## XXIII

### REPRESENTATION OF THE NATIVES

#### 1. Parliament

WE have already dealt with the representation of the natives in the parliament of the Union.<sup>1</sup> We pointed out that four senators were appointed by the governor-general-in-council on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa.<sup>2</sup> Further, the South Africa Act preserves in the election of members for the house of assembly the franchise laws of the different colonies.

In the Cape province no distinction was made before the Union between European and native, and a large number of natives who are qualified in respect of property or salary, as well as educationally, are included in the electoral rolls. In Natal natives are entitled to become parliamentary voters only with the specific authority of the governor-general. The number so authorized is negligible. In the Transvaal and Orange Free State the natives have no franchise, nor have they the franchise in South-West Africa. The franchise laws for the provincial councils are the same as those for parliament, but in the Cape province natives and coloured persons, if qualified to be voters, may be elected to the provincial council.

#### 2. The Native Affairs Commission

In order to compensate for the lack of any voice in the government of the country, the Native Affairs Act, No. 23 of 1920, established a native affairs commission, which consists of three to five European members holding office for an indefinite period and presided over by the minister for native affairs. The members, though in receipt of salaries as commissioners, may sit in either house of parliament. The functions and duties of the commission include the consideration of any matter relating to the general conduct of the administration of native affairs, or to

<sup>1</sup> See *supra*, Chapter X. 2 (b).

<sup>2</sup> Section 24 of the South Africa Act, 1909.

legislation in so far as it may affect the native population, and the submission to the minister of its recommendations in any such matters. Its functions are thus merely advisory, but adequate means are reserved to it of placing its views before the cabinet and parliament should its recommendations not be accepted. For example, the commission may require the minister to place its recommendation together with a memorandum of its views on any action of the minister contrary to such recommendation, before the governor-general-in-council, and thereafter all the papers must be laid before parliament, as well as the views of any dissenting member of the commission.

The principles which the commission considers should underlie its duties are the following: (i) that it is established primarily and essentially to be the friend of the native peoples, and, as such, the needs, aspirations, and progress of the natives should be considered sympathetically by it; (ii) that it is the adviser of the government in matters affecting the interests of the natives; (iii) that it should endeavour to win the confidence of the natives; and (iv) that it should strive to educate public opinion so as to bring about the most harmonious relations possible between the white people and the black people in South Africa. The commissioners have travelled widely throughout the Union for the purposes of the closer study of native problems and of coming into contact personally with native points of view. They have dealt with a number of specific matters of native administration, and have investigated certain general questions of native policy, such as native taxation and education, the pass laws, the control of natives in urban areas, land administration, and the extension of the system of local native councils as contemplated by the Native Affairs Act, 1920. They have, in addition, conducted inquiries into special matters of native interest referred to them by the government for investigation and report.

### 3. Native Conferences

The Native Affairs Act, 1920, also provided for the summoning of conferences of native persons and bodies representative of native opinion, with the object of enabling the government to gauge more accurately the state of native thought and feeling, and of affording to those not otherwise represented the opportunity of expressing their views. The first of such conferences,



which was attended also by the native affairs commission, was held in 1922. Subsequent conferences have discussed principally proposed legislation affecting natives, submitted to them by the government.<sup>1</sup>

The section of the Native Affairs Act, 1920, regarding native conferences reads as follows:

16. (1) The Governor-General may, upon the recommendation of the Commission, convene conferences of chiefs, members of native councils and prominent natives, and of native delegates invited from any association or union purporting to represent any native political or economic interest, with a view to the ascertainment of the sentiments of the native population of the Union or of any part thereof, in regard to any measure in so far as it may affect such population.

(2) Such conferences shall be assisted in their deliberations by persons to be designated by the Minister of Native Affairs, who is hereby empowered to authorise any expenditure which he may consider desirable in this connection from moneys appropriated by Parliament for the purpose.

The representation of native opinion in the government of the country is entirely inadequate. Even the native affairs commission, invaluable as it is, does not supply the need of a permanent body of native representatives who could represent the native point of view through either the minister or the native affairs commission.

The affairs of the natives in matters of local government, where that has been allowed them, have been conducted so well that a little more may be done in the way of having a non-European native commission, who would possibly exercise an enormous influence for good amongst the natives.

<sup>1</sup> Conferences have been held annually from 1922 until 1927; one was held in 1930. It was not considered necessary to convene conferences in 1928, 1929, 1931-3.

## XXIV

### LOCAL GOVERNMENT OF THE NATIVES

#### 1. Local Councils

UNDER the Native Affairs Act, 1920, the governor-general, on the recommendation of the native affairs commission, established local councils over areas set apart for natives. These councils consist entirely of natives and have not more than nine members. An officer of the public service is designated by the minister of native affairs to preside at the meetings of a local native council and generally to act in an advisory capacity to it.

Any local council may, within the area for which it is established, provide (a) for the construction and maintenance of roads, drains and furrows, and for the prevention of erosion; (b) for an improved water supply; (c) for the suppression of diseases of stock by the construction and maintenance of dipping tanks and in any other manner whatsoever; (d) for the destruction of noxious weeds; (e) for a suitable system of sanitation; (f) for the establishment of hospitals; (g) for the improvement in methods of agriculture; (h) for afforestation; (i) for educational facilities; and generally for such purposes which can be regarded as proper to local administration as may be committed to it by direction of the governor-general. A local council may acquire and hold land or an interest in land for carrying out any of the above-mentioned purposes. It is the duty of each local council to advise the native affairs commission in regard to any matters which may affect the general interests of the natives represented by such local council, and to furnish its views on any matter upon which the minister of native affairs or the native affairs commission may request its advice.

Each local council may make by-laws in regard to any matter entrusted to its care, and may prescribe the fees payable for the services it renders. The by-laws have to be approved by the governor-general and published in the *Gazette* and they then have the force of law. Contraventions of the by-laws are punishable at the instance of the crown, but the fines imposed are paid over to the local council concerned. Each local council may levy a rate not exceeding one pound in any year upon each adult male

native ordinarily resident within the area for which it is constituted. If any native upon whom such rate is levied is liable to any direct tax to the government specially imposed upon natives, such government tax is abated by the amount of the rate levied by a local council. The revenue of each local council thus consists of the rates levied, the fees collected under by-laws, the fines recovered for contraventions of by-laws, as well as donations or grants of public moneys by the government and others. If the application of the Native Affairs Act is found to conflict in any area with the ordinary system of local government, the governor-general may by proclamation in the *Gazette* declare the extent to which the system of local government shall apply in that area, and he may make such further provision as in the circumstances may be expedient for reconciling the conflict between the local councils and the ordinary system of local government. Local councils are designed to be real local government bodies, independent of European control in their deliberations. The officials of the government act in an advisory capacity only. More than fifteen local councils have been established and their work has given much satisfaction both to the government of the country and to the natives themselves.

The most famous of the local councils is the Glen Grey District Council, which was established under the provisions of the Glen Grey Act (Cape), No. 25 of 1894. It consists of the magistrate of Lady Frere as chairman, six natives nominated by the government, and six natives elected by the location boards established under the act. The revenues of the council are derived from the rates levied in terms of the act and are spent, subject to the approval of the government, in the interests of the natives, on dipping tanks, roads, the encouragement of agriculture, irrigation, and public health.

## 2. General Councils<sup>1</sup>

Whenever it appears that any of the powers conferred upon local councils can, in any two or more areas for which local councils have been established, be more advantageously exercised by a single body with jurisdiction over all those areas, the governor-general may, with the approval of the native

<sup>1</sup> A great portion of this section is taken from the *Official Year Book of the Union*, Chapter XXVI.

affairs commission, establish such a body to be called the general council of such areas. This general council consists of such number of representatives from each of the local councils as the governor-general, with the advice of the native affairs commission, may determine. An officer of the public service may be designated by the minister of native affairs to act as chairman of the general council. The chairman of each of the local councils shall, if required by the minister, attend the meetings of the general council in an advisory capacity. The general council so established has such powers as the governor-general, on the advice of the native affairs commission, may allocate to it, and the local councils shall upon such allocation cease to exercise the powers so allocated.

The establishment of general councils under a formal constitution dates from the beginning of 1895, when district councils were created in four districts of the Transkeian territories, the four being united in what was called the Transkeian General Council. In 1903 the system was extended to the seven districts of Tembuland and East Griqualand, when the name of the larger body was changed to Transkeian Territories General Council. By 1924, with one exception, the mainly European district of Mount Currie, all districts within the Transkeian Territories, excluding Pondoland, had accepted the council system and fell under the jurisdiction of the Transkeian Territories General Council. In 1911, the council system in a somewhat modified form was extended to Western Pondoland, and the Pondoland General Council was established, and in 1927 its jurisdiction was extended to Eastern Pondoland.

Under the provision of Proclamation No. 279, November 18, 1930, the Transkeian Territories General Council and the Pondoland General Council were amalgamated, with effect from January 1, 1931, into a general council styled the United Transkeian Territories General Council, and the combined organization now functions for all districts in the Transkeian Territories, except Mount Currie. Proclamation No. 279 of 1930 laid down that the seat of the Transkeian Territories General Council should be at Umtata, and that its meetings should be convened at that place from time to time by the chief magistrate of the Transkeian Territories upon dates to be fixed by him: it vested in the amalgamated body all powers previously enjoyed

by the constituent councils in their respective areas of jurisdiction and provided for the transfer of all property, assets, and liabilities of the old councils to the new body; it prescribed that all officers and employees of the Transkeian Territories General Council and the Pondoland General Council should become officers and employees of the United Transkeian Territories General Council, and that as such they should retain all their existing and accruing rights.

Each district council in the Transkeian Territories, with the exception of Lusikisiki, Libode, and Umtata, consists of the magistrate of the district and six members and is constituted in the following way: Two members of each council are nominated and appointed by the governor-general. For the appointment of the other four, each district is divided into four electoral areas known as sections, and the local taxpayers and native quitrent payers in each section elect three representatives. Thereafter these representatives nominate, in the territories other than Pondoland, four of their number, and in the territory of Pondoland, two of their number, to be recommended to the governor-general for appointment as district councillors. The chiefs of Eastern and Western Pondoland nominate two local nominees for appointment by the governor-general as members of each district council within their respective areas. The chiefs of Eastern Pondoland, Western Pondoland, and Tembuland are *ex officio* members of the Lusikisiki, Libode, and Umtata district councils respectively. Each district council meets in the ordinary course six times a year, but special meetings may at any time be summoned by the magistrate of the district.

A revision of the constitution was undertaken in 1932 and was in due course given the force of law under Proclamation No. 191 of October 24, of that year. Provision was made therein for the constitution of an executive committee, consisting of the chief magistrate, three magistrates appointed from time to time by the chief magistrate, and four native members of the general council, elected annually by the council for appointment by the governor-general. The executive committee is responsible for the administration and control of the following council affairs: appointment, discipline, and dismissal of pensionable officers; scholarships; the establishment of new agricultural institutions; new agricultural institution buildings; acquisition and disposal

of farms; establishment, acquisition, and disposal of plantations; consideration of tenders for any service, the lowest tender for which is over £100; and the institution of legal proceedings.

The United Transkeian Territories General Council consists of three native members from each council district, nominated and appointed in a prescribed manner, together with the chiefs of Eastern and Western Pondoland and Tembuland. The magistrates of the council districts are entitled to attend and to take part in the deliberations at all meetings of the general council. The chief magistrate is the chairman and chief executive officer of the council.

The councils are constituted as advisories to the administration, associating the people with the control of local funds, giving them a voice in the disposal of affairs intimately affecting their own interest, training them to constitutional methods of expressing their wishes in regard to local and general policy, and also keeping the government in touch with native feeling. Debates cover a wide range of subjects, including the revision of laws particularly affecting the native population, such as native marriages and inheritance, education, diseases amongst stock, control of commonages, forests, &c. Questions come before the general council directly by motions introduced by magistrates or members, and also on submission from district councils and references from the government, frequent use being made of the committee system. The resolutions of the councils having been taken on the subjects placed before them, the responsibility for action thereon rests on the magistrates, the treasurer, the chief magistrate, the minister, or the governor-general, according to the importance of the matters involved.

In local administration the various district councils stand to the general council in the relation of individual parts of a single body. They are the executive organs of the general council, which distributes amongst them such duties as dipping operations, road maintenance, and supervision of commonages, but remains financially responsible for their actions. Strictly speaking they have no separate income or expenditure, but there is one common treasury into which all revenues flow and which is chargeable with the cost of the different services authorized. This arrangement has the twofold merit of allowing for local variations and ensuring, under better control, the accumulation

of funds which enables the undertaking of projects beyond the means of any single district organization.

Prior to 1926 the main source of revenue was a rate levied annually by the governor-general and capable of variation in amount according to the advice of the general council. It was, however, always fixed at 10s. payable by every male adult in the area under the council's jurisdiction.

The Native Taxation and Development Act, 1925, supersedes all previous systems of native taxation. Under the provisions of the act the general council receives the quitrents collected in all council districts, which were hitherto paid to the government, and in addition, the local tax of 10s. payable in respect of every hut or dwelling in a native location, according to the number of wives, not exceeding four, for whom the taxpayer is responsible. Quitrent payers are exempted from local tax.

In general, the district councils are responsible for the initiation of expenditure proposals which are collated and laid before the general council in the form of annual estimates of expenditure. After revision by the treasurer the votes of the council are taken thereon, and they are then submitted for the approval of the governor-general. Council operations embrace the maintenance of roads and the construction of new ones, the construction and repair of dipping tanks, bridges and causeways, the provision and upkeep of wattle plantations, prevention of soil erosion, the dipping of large stocks, grants in aid of fencing of arable allotments and of hospitals; and lastly, its own institutions for the teaching of agriculture, and for the improvement of stock breeding amongst natives and experimenting in and encouraging the cotton-growing industry. As a general rule the council is not in receipt of government or provincial grants, nor does it, within its area, levy rates upon Europeans, who nevertheless share in most of the benefits accruing to ratepayers from council expenditure.

### 3. Orange Free State Native Reserves<sup>1</sup>

In connexion with other areas of the Union, there are in the Orange Free State three areas reserved for the exclusive occupation of natives. In the Witzieshoek Reserve, the chief of the tribe who is appointed by the government, exercises a limited

<sup>1</sup> This section is taken from the *Official Year Book of the Union*, Chapter XXVI.

jurisdiction in civil cases but none in criminal cases, is exempt from tax, and is bound to give all the required assistance for the preservation of order and peace within the territory. The representative of the government, who is responsible for the administration of the reserve, is known as the commandant, and is an officer of the native affairs department. In civil cases there is an appeal from the decision of the chief to the commandant, and in criminal cases the commandant has all the powers granted to courts of resident magistrates. The commandant must reside within the reserve, and is charged with the collection of native taxes therein. He keeps a register of all male persons in the reserve, as well as of the number of huts, and exercises a general oversight over the affairs of the reserve.

In addition to these officials, there is a board constituted under Ordinance No. 6 of 1907, consisting of seven members. Five of these are natives of the reserve and two—the chairman and the vice-chairman—are Europeans. All the members are nominated by the government. The powers and duties of the board include the maintenance and repair of roads (other than main roads), the provision of water supply and sanitary services, and the establishment and support of schools in consultation with the education authorities. The board is empowered, subject to the approval of the government, to make such regulations as may be necessary for carrying out these functions, and for other purposes connected with the management of the reserve.

In the Thaba 'Nehu and Seliba Reserves, an officer of the native affairs department, with the rank of assistant native commissioner, is responsible for the administration of the reserves, each of which has, moreover, a local board constituted under the provisions of the Native Reserves Ordinance, No. 6, of 1907 (Orange Free State).

The various native reserve boards in the Orange Free State are, under the provisions of the Native Taxation and Development Act, 1925, paid the local tax collected from natives within their respective areas of jurisdiction.

#### 4. Mission Stations<sup>1</sup>

Under Act No. 29 of 1909 (Cape), certain mission stations, in which land was held in trust by the missionary body for the

<sup>1</sup> See footnote, page 456.



native and coloured occupants, were brought under a system in which a definite grant of land was made to the missionary body for the purposes of its work, and the remainder of the station was demarcated and reserved for the registered occupiers. For the control and regulation of the native or coloured community thus established, a board of management is provided by the act. The board consists of six members elected by the registered occupiers and three appointed by the governor-general, and is presided over by the magistrate of the district. The board is endowed with certain of the duties and functions of a village management board, mainly the control of roads, fences, sanitation, water supply, and the use of the commonage, and it has power to make regulations in regard to those matters, subject to the approval of the governor-general. The board may levy a rate of not less than 10s. per year on each registered occupier for the purpose of defraying the cost of administration.

THE EXECUTIVE ADMINISTRATION OF  
NATIVE AFFAIRS

WE have already seen that the natives are without any direct representation in the government of the Union. They do not elect any representatives to parliament and are consulted, if at all seriously, in a very indirect manner. Parliament, therefore, is not responsible, in the usual political sense of the word, to the natives for the legislative enactments which it imposes upon them.

There is even less direct control, either by the elected representatives of the European population in parliament, or by the natives outside parliament, over the executive administration of native affairs. The minister for native affairs carries out administratively the decisions of the governor-general, made through the cabinet. In so far as the natives are concerned, the governor-general is the supreme chief. In practice as well as in theory, the cabinet exercises for the governor-general a despotic power of administration as well as of legislation which has no parallel in any democratic country anywhere in the world. Executive despotism in South Africa is not the result of the absence of political representation for the natives; nor has the absence of political representation made executive despotism necessary. The two problems are entirely unrelated to each other. Both executive despotism and political representation could exist side by side without any conflicting results, and in the best interests of the native population. For, though a considerable number of natives may in time emerge from the black mass of the native population as civilized as ordinary Europeans, the vast majority of the native population is still in its political infancy. It is impossible to apply an eighteenth-century European philosophy of democracy to a population which has hardly emerged from a twelfth-century system of serfdom. Nowhere in the world, we venture to suggest, does there exist a system of executive despotism similar to the executive administration of native affairs in South Africa. In other portions of Africa we may see an absolute control of the native population; but this

control is control by an external power; there is no pretence to parliamentary government. In the Union, however, we see all the trappings of parliamentary government side by side with the absolute and autocratic power of a despotism.

### 1. The Governor-General as Supreme Chief of the Natives

The South Africa Act provides that:

147. The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General-in-Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive Council of any Colony for the purpose of reserves for native locations shall vest in the Governor-General-in-Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor and Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Act of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament.

Section 147 does not affect the legislative authority of parliament or of the provincial councils. It refers only to the administrative powers of the governor-general respecting natives and Asiatics.<sup>1</sup> For example, the making of regulations for the supervision of native locations falls within the powers of the governor-general-in-council under this section.<sup>2</sup>

Section 1 of the Native Administration Act, 1927, provides that:

1. The Governor-General shall be the supreme chief of all Natives in the provinces of Natal, Transvaal, and Orange Free State, and shall in any part of the said Provinces be vested with all such rights, immunities, powers, and authorities in respect of all Natives as are vested in him in respect of Natives in the Province of Natal.<sup>3</sup>

The powers of the supreme chief are to be found in that remarkable document, the Natal Code of 1891. The relevant sections of the code are the following:

<sup>1</sup> *Ree v. Amod*, [1922] A.D. 217.

<sup>2</sup> *Sdumbu v. Benoni Municipality*, [1923] T.P.D. 289.

<sup>3</sup> As amended by section 2 of Act 9 of 1929.

32. The Supreme Chief for the time being exercises in and over all Natives in the Colony of Natal all political power and authority.
33. The Supreme Chief appoints all Chiefs to preside over tribes or sections of tribes; and also divides existing tribes into two or more parts, or amalgamates tribes or parts of tribes into one tribe, as necessity or the good government of the Natives may, in his opinion, require.
34. The Supreme Chief-in-Council may remove any Chief found guilty of any political offence, or for incompetency or other just cause, from his position as such Chief, and also order his removal with his family and property, to another part of the Colony.
35. The Supreme Chief has absolute power to call upon Chiefs, District Headmen, and all other Natives, to supply armed men or levies for the defence of the Colony, and for the suppression of disorder and rebellion within its borders, and may call upon such Chiefs, District Headmen, and all other Natives to personally render such military and other service.
36. The Supreme Chief has power to call upon all Natives to supply labour for public works, or for the general need of the Colony. This call or command may be transmitted by any person authorised so to do, and each Native so called upon is bound to obey such call, and render such service in person, unless lawfully released from such duty.
37. The Supreme Chief, acting in conjunction with the Natal Native Trust, may, when deemed expedient in the general public good, remove any tribe or tribes, or portion thereof, or any Native, from any part of the Colony or Location, upon such terms and conditions and arrangements as he may determine.<sup>1</sup>
38. The orders and directions of the Supreme Chief, or of the Supreme Chief-in-Council, may be carried into execution by the Secretary for Native Affairs, or by the Administrators of Native Law, or by other officers authorised for the purpose, and in respect of all such acts the various officers so employed shall be regarded as the deputies or representatives of the Supreme Chief, or of the Supreme Chief-in-Council, as the case may be.
39. The Supreme Chief, in the exercise of the political powers which attach to his office, has authority to punish by fine or imprisonment, or by both, for disobedience of his orders or for disregard of his authority.
40. The Supreme Chief is not subject to the Supreme Court, or to any other Court of Law in the Colony of Natal, for, or by reason of, any order or proclamation, or any other act or matter whatsoever committed, ordered, permitted, or done either personally or in Council.

<sup>1</sup> Cf. the provisions of the Riotous Assemblies Amendment Act, 1930, which are dealt with *supra*, Chapter XXII.

The supreme chief acts administratively through the minister of native affairs.

Nowhere else in the British Empire does such an arbitrary code exist. In the Cape, there is in the Transkeian Territories, a purely native area in the eastern portion of the province, a chief magistrate at the head of the natives, and he possesses wide administrative and judicial powers. He occupies the position of a paramount chief, all executive and nearly all judicial power being concentrated in his hands, and a good deal of legislative or quasi-legislative authority also vests in him. In the Ciskei (which is a native territory to the west of the Kei river) there is a chief native commissioner who exercises the powers and duties which the minister from time to time may prescribe. In Natal, the chief native commissioner deals administratively with native affairs throughout the province including Zululand.

In the other districts of the Union there are either magistrates or native commissioners who exercise the powers and perform the duties which the minister may from time to time prescribe. The minister may also appoint superintendents to control native locations.

Regarding chiefs, the governor-general may recognize or appoint any person as a chief or headman in charge of a tribe or location, and he may at any time depose him. There are regulations prescribing the duties, powers, and privileges of such chiefs and headmen. A great number of chiefs and headmen are subsidized by the government. In some cases a fairly substantial allowance is paid according to the services rendered, but in most cases the allowance is small, and is made as a token of recognition rather than as a remuneration for services. Their powers, duties, and jurisdiction vary in different parts of the country. All serve under district officials (magistrates or native commissioners) and are in charge of tribes or locations, for whose conduct they may be held responsible.

The most remarkable feature of the Native Administration Act, 1927, is the extension of the powers of the supreme chief regarding legislation by proclamation. The governor-general is empowered to alter any existing laws and make new laws for the native areas included in the schedule to the Natives Land Act, 1913, or any future designated native area. Every proclamation issued by the governor-general under the act must be

laid upon the table of both houses of parliament, and parliament may alter or repeal such proclamation by resolution of both houses. The governor-general may also by proclamation amend the Natal code of native law, but such a proclamation can only take effect a month after publication. The governor-general may also make regulations for the prevention of misconduct and disorders, the control of the movements of natives, and for such purposes 'as he may consider necessary for the protection, control, improvement, and welfare of the natives, and in furtherance of peace, order and good government'. Regulations may also be made for the control of certain native villages and townships.

## 2. The Control of Natives

(i) *The Natives (Urban Areas) Act, 1923*. Section 85 of the South Africa Act granted to the provincial councils power to make ordinances in relation to local authorities and all matters which in the opinion of the governor-general-in-council were of a merely local or private nature. Section 147 of that act, however, as we have seen, vested in the governor-general-in-council the control and administration of native affairs throughout the Union. The native affairs department has, therefore, since 1910 been concerned in this connexion with the oversight of all regulations submitted for approval and the preparation of legislation affecting natives. The conditions prevailing in the urban native locations in all the provinces of the Union had been far from satisfactory. This may be attributed to the attitude of local authorities toward the native, the passive indifference or occasionally active hostility of the natives themselves, and the admitted inadequacy of the existing native legislation. Local authorities derived their powers of native regulation in native matters from laws which were characterized by a wide divergence of policy between the legislatures of the pre-Union colonies. It was not until 1923 that appropriate legislation was passed to deal with the problem of natives in urban areas. The Natives (Urban Areas) Act, No. 21 of 1923 is a comprehensive enactment providing, in terms of its title 'for improved conditions of residence for natives in or near urban areas and the better administration of native affairs in such areas; for the registration and better control of contracts of service with

natives in certain areas and the regulation of the ingress of natives into and their residence in such areas ; for the exemption of coloured persons from the operation of pass laws ; for the restriction and regulation of the possession and the use of Kaffir beer and other intoxicating liquor by natives in certain areas and for other incidental purposes'. Generally it defines and describes the powers and the duties of urban local authorities in respect of the native population within their areas, requiring them to set aside land for the accommodation of the natives who are legitimately within their boundaries. It provides, in cases where it may be expedient, for the compulsory residence of natives, with certain exceptions, in locations, native villages, or hostels, and gives to the local authority powers of expropriating land and borrowing money to meet the responsibility thrown upon it. It lays down certain principles to be followed in the administration of native affairs, such as the establishment of a native revenue account and of native advisory boards, and makes provisions for government inspection. In view of the responsibility thrown upon local authorities, the governor-general is authorized to confer or exercise by proclamation certain powers of control, whereby the native population may be limited to the number legitimately required for the needs of the community. These powers may also be exercised in industrial areas other than those under the jurisdiction of an urban local authority. The act prohibits the introduction of intoxicating liquor into locations, native villages, or hostels, but allows, subject to varying circumstances, the private brewing of Kaffir beer or its manufacture and sale by the local authority. (This privilege has not yet been exercised by local authorities.) It further limits the right of trading in a native village or location to native enterprise or, if that should not be adequate, it authorizes municipal trading in these areas.

(ii) *Pass Laws*. Pass laws based on various statutes are in operation throughout the Union, with the exception of the Cape Province (excluding the Transkei), where the natives (unless accompanied by live stock) enjoy entire freedom of movement. The pass system is one under which every native must possess a document of identification issued by the native affairs department. This document describes the native's tribe, father, place of birth, &c. The argument in favour of the retention of this

system, which has earned the bitter hostility of the natives, is that it is the only means of reference which the European has in regard to the illiterate and ignorant type of native, and the only means of identifying criminals and controlling the movements of natives.<sup>1</sup> In most urban areas a curfew system prevails, and natives are prohibited from being in a public place after nine o'clock, as their free movement during the night, it is thought, encourages and facilitates theft and other crime.

Under the Natives (Urban Areas) Act, 1923, particular areas or districts may be proclaimed 'curfew areas'. The following is a curfew proclamation:

### PROCLAMATION<sup>2</sup>

#### URBAN AREA OF MALVERN (NATAL): CURFEW

Under and by virtue of the powers vested in me by sub-section (1) of section *nineteen* of the Natives (Urban Areas) Act, 1923, Amendment Act, 1930, I do hereby proclaim, declare and make known that from and after the 3rd day of July, 1931, no native, male or female, not being exempted under paragraph (b) of sub-section (4) of the said section, shall, between the hours of 11 p.m. and 4.30 a.m., be in any public place within the area controlled by the Malvern Local Administration and Health Board, unless such native be in possession of a written permit signed by his employer or by a person authorized by such employer to issue such permit to such native or by some person authorized by the Malvern Local Administration and Health Board to issue such permits or by the officer in charge of any police station within such area.

GOD SAVE THE KING.

Given under my Hand and the Great Seal of the Union of South Africa at Capetown this Twenty-sixth day of May One thousand Nine hundred and Thirty-one.

CLARENDON,

*Governor-General.*

By Command of His Excellency the  
Governor-General-in-Council.

E. G. JANSSEN.

<sup>1</sup> The Pass Laws provide that failure to produce a pass or exemption certificate when required to do so by a police officer is a criminal offence.

<sup>2</sup> By His Excellency the Governor-General, &c. In nearly every urban area in the Transvaal, Natal, and Orange Free State, no unexempted native may be upon the public highway without being in possession of a written permit or 'special pass' (as it is commonly termed) signed by his employer or some person authorized by law to issue such permit. For regulations regarding exemptions see *Government Gazette* of 17 August, 1934.



(iii) *The Native Service Contract Act, 1932*. This act, which was passed in 1932, has given rise to much controversy, and requires examination. The act provides that no person shall employ any male native unless the latter produces to him a document of identification, and if a native is under the age of eighteen, the native, male or female, must produce the consent of his or her guardian as well as that of the owner of the land upon which such native is domiciled. Any owner of land to whom the native is required to render services, must, under penalty of punishment in a magistrate's court, give the native the consent when he is requested by him to do so. Guardians of natives under eighteen and above the age of ten years may bind their wards by service contracts. These contracts must be made before a competent officer appointed by the government under the Native Regulation Act, 1911, before a magistrate, a police officer in charge of a police station, or a justice of the peace. Such officer must fully explain the meaning and effect of the service contract to the parties, and if satisfied that the parties desire to enter into the contract as recorded, he must sign the contract and make an endorsement of his official capacity, of the duration of the contract, and of the name and residence of the employer.

These provisions apply also to a labour-tenant contract. A labour-tenant is a native who wishes to give or gives his services to the owner of land in return for the right of occupation and use of the land. These contracts may not be for a period longer than three years. Three months before expiration, either party may give notice of his intention to terminate the contract on its expiration, otherwise the contract shall be deemed to be renewed for a period of one year. When a labour-tenant contract does not define the particular period in any year during which the native bound by that contract shall render service to his employer, but provides that such native shall render such service whenever called upon to do so by his employer, the latter may, apart from any other ground of terminating the contract, regard such contract as having been terminated if during a period exceeding three months, he has been precluded from calling upon such native to render such service in full by reason of the absence of such native from the employer's land without the latter's permission.

If, on the termination of a labour-tenant contract from whatever cause, the labour-tenant has any crop standing on the land which he was entitled to cultivate by virtue of such contract, he shall be entitled to tend such crop till it matures and thereafter to reap and remove it. If he has erected any buildings or other structures on the land from his own materials, he may remove the buildings and materials, unless he has obtained the materials free of charge from the owner of the land.

Whenever two or more natives belonging to the same kraal or household are bound under any labour-tenant contract, any ground for terminating a contract with one native shall bind the whole kraal or household.

There is one section of the act, namely section 9, which was the subject of bitter controversy. The governor-general has power to define by proclamation in the *Gazette* any area to which the section shall apply. The section provides that if any native male other than a chief or headman between the ages of eighteen and sixty, and physically and mentally fit to perform manual labour, residing in a proclaimed area outside a location or an urban area, has not during a period of not less than six months in the aggregate, or not less than three months, as the governor-general may determine, rendered service to the owner of the land on which he resides, such owner shall be liable to a tax of five pounds annually for every such non-serving native. The effect of this section is regarded by some as imposing compulsory or forced labour upon the natives; by others as compelling owners of the land to give work to those residing on their land, without any remuneration for such work.

Its effect can only be to force the natives to work whether or not they or the owners of land desire it. Although the section has not been applied in any area up to the present, yet it is to be hoped that public opinion, within a short time, will demand the repeal of this retrogressive enactment.

NATIVE LAND TENURE AND LAND  
ADMINISTRATION<sup>1</sup>

## 1. The Natives Land Act, 1913

NATIVE land administration is governed by the Natives Land Act, 1913. This act laid down that, except with the approval of the governor-general, a native might not acquire from a person other than a native, or a person other than a native from a native, any land or interest in land in any area outside of the native areas described in the schedule to the act; and that without such approval no person other than a native might acquire any land or interest in a scheduled native area. The purpose of the act was to maintain the *status quo* as regards the ownership and occupation of land in the Union relatively by natives and Europeans 'until Parliament should make other provision'. So far nothing definite has been done in this direction.

In 1926, the prime minister, General Hertzog, laid upon the table of the house his series of bills, generally known as the 'native bills', consisting of the Representation of Natives in Parliament Bill, the Union Native Council Bill, the Natives Land (Amendment) Bill, and the Coloured Persons Rights Bill. These bills were, with certain minor modifications, formally introduced into parliament, and read a first time in 1927. After the first reading they were referred to a select committee. In 1929 three of the bills, The Natives Parliamentary Representation Bill, The Coloured Persons Rights Bill, and the Natives Land (Amendment) Bill, were introduced and read a first time. The first two, having regard to their provisions, were required to be dealt with by both houses of parliament sitting together in accordance with sections 35 and 152 of the South Africa Act, 1909, and were passed on second reading. At the third reading, before the joint session, however, the Natives Parliamentary

<sup>1</sup> This chapter is based on Chapter XXVI of the *Official Year Book of the Union*. The natives of the Union, who form 80 per cent. of the population, own 8 per cent. of the land.

Representation Bill failed to secure the requisite two-thirds majority, and under the circumstances, the Coloured Persons Rights Bill and the Natives Land (Amendment) Bill were not proceeded with. The cardinal feature of the Natives Land (Amendment) Bill is that it makes provision for the removal, in respect of certain areas defined in the first schedule to the bill and termed 'released areas', of the restrictions imposed by the Natives Land Act, 1913, upon the acquisition of land by natives.

The present position is that the government readily recommends for the approval of the governor-general, under section one of that act, transactions whereby natives are to acquire, by purchase or lease, land or an interest in land within the areas defined in the first schedule to the Natives Land (Amendment) Bill, 1929. Thus, in so far as those areas are concerned, relief is afforded from the restrictions imposed by section one of the 1913 Act.

## 2. Individual Tenure

In the early days the necessity of inculcating amongst the natives, by a gradual process, European methods and ideas in respect of the ownership and occupation of land does not seem to have been sufficiently realized, with the result that individual tenure of land, which was entirely foreign to native ideas, was introduced before the people were ripe for it, or understood its implications, and in a form unsuitable for natives in their then stage of development, allotments being granted on the same basis and more or less subject to the same conditions as applied in the case of Europeans. These conditions naturally militated against the success of the earlier native location surveys.

A better appreciation of conditions existed when the Cape Act, No. 40 of 1879, was passed 'to provide for the disposal of the lands forming native locations'. This act contemplated the division of each location into a sufficient number of arable and residential allotments, to enable grants to be made to the location residents, and the reservation of the remaining extent as commonage for the use of the registered holders. The act provided that the grants should be made, subject to conditions to be approved by both houses of parliament; and from time to time, as fresh grants were made, advantage was taken of this

provision to insert in the title deeds conditions which experience had shown to be desirable and necessary.

The greatest defect in the system of individual tenure applied in native locations prior to the passing of the Glen Grey Act, 1894, lay in the fact that no provision was made for a simple and inexpensive method of transfer, so that these small holdings, on the average not more than five morgen in extent, could be transferred only by means of a formal deed in the ordinary course, a procedure involving in many instances the payment of legal fees amounting to more than the actual value of the land. Further, the natives themselves refused to appreciate the necessity, when transferring their land, of doing more than hand over the actual title deed to the new owner. The result was that in the great majority of cases transfer of land not held under the Glen Grey system was never registered, though the allotments frequently changed hands. The confusion arising out of this state of affairs was such that it became necessary, by legislation, to create a special machinery to deal with the position. To this end provision was made in section 8 of the Native Administration Act, No. 38 of 1927, first for the appointment of *commissioners to investigate and determine the rights of occupation and ownership* in all such cases, and secondly, on payment of a fee of £1, for the transfer of the holdings concerned direct to the respective owners, as determined by the commissioners.

The principles embodied in the Glen Grey Act, 1894, constitute the best methods yet devised of applying the European system of individual tenure to the requirements of the native people. The essential features of the Glen Grey system are: (a) perpetual quitrent grants; (b) the land granted is inalienable, save with the consent of the governor-general; (c) it is hereditary according to the law of primogeniture as observed by the natives themselves; (d) a simple and inexpensive method of transfer, by endorsement on the title-deed is provided; (e) the land is subject to forfeiture under certain circumstances. Provision is contained in section 6 of the Native Administration Act, 1927, for the establishment by governor-general's proclamation of special deeds registries for the registration of deeds relating to immovable property owned by natives in scheduled native areas. The Glen Grey system of individual tenure has been

extended to districts of the Transkeian Territories. The cardinal features of the system have already been indicated, but it should be mentioned, in so far as the Transkeian Territories are concerned, that by taking advantage of the edictal system of legislation operative there, it has been practicable to introduce modifications and improved methods from time to time with a readiness which would not have otherwise been possible. During 1918 the first definite step was taken towards introducing individual tenure of land into the native areas of Natal. No system of individual tenure has been introduced in the Transvaal and Orange Free State Native Locations and Reserves, where the land is still occupied by the people under the communal or tribal system.

### 3. The Natal Native Trust

The Natal Native Trust was constituted under letters patent in 1864. In this body are vested over two million acres of location land, which are administered by the trust for the benefit of the natives living thereon. No rent is payable by natives living on location land, who are liable for the general tax of £1 per annum and for the local tax of 10s. per annum in respect of each hut or dwelling.

Prior to the constitution of the Union the members of the executive council for the time being were *ex-officio* members of the Natal Native Trust; but Act No. 1 of 1912<sup>1</sup> makes provision for the delegation by the governor-general to the minister of native affairs of the administration of all such matters as were on May 3, 1910, and since that date, administered by any legally constituted native trusts. Both locations and mission-reserves are held under deeds of grant from the government, the latter being tracts of land in various parts of the country set apart in order that the missionary bodies referred to in the deeds of grant may have a fixed population among which to carry on their labours. These grants were made between 1862 and 1887. Up to 1890 no rents were collected in the mission-reserves except for a few store-sites. The rule of requiring payment of rent from new tenants as a condition of allowing them to come on the reserves was passed in 1888, but no rents were collected before 1890. The rent varied from time to time and in different

<sup>1</sup> Natal Native Trust and Native Administration Act, 1912.

reserves, but was fixed in 1919 at a uniform rate of £1 per annum payable by the occupier of each hut.

#### 4. The Zululand Native Trust

The Zululand Native Trust was constituted under deed of grant in 1909, the trustees being the governor and the executive council of Natal. Since the passing of Act No. 1 of 1912, the Zululand Native Trust has been administered in the same way as the Natal Native Trust, i.e. by the minister of native affairs, acting under a delegation of authority made by the governor-general in terms of section 2 of the act.

In the Zululand Native Trust are vested by the deed of grant, the twenty-one Zululand native reserves, measuring nearly three million acres. The inhabitants of these reserves do not pay rental, but are liable to general and local tax under the provisions of Act No. 41 of 1925.

## XXVII

### THE TAXATION OF NATIVES

#### 1. Individual Taxation

NATIVE taxation, apart from the ordinary taxation levied on the whole population of South Africa, is regulated by the Natives Taxation and Development Act, 1925.<sup>1</sup> Few natives earn sufficient income to fall within the provisions of the income tax acts, and special legislation had to be passed in order to tax the majority of natives, who, unlike the majority of Europeans, do not fall within the provisions of the income tax acts. The provincial councils may not impose special or differentiating taxation on natives. Under the Natives Taxation and Development Acts, every male native, who has reached the age of eighteen years, pays a personal tax, known as the general tax, of £1-per annum; and in addition, the occupier of every hut or dwelling in a native location pays a local tax of 10s. per hut per annum. The maximum amount payable as local tax by any native is £2, and the tax is not payable by natives holding land on quitrent tenure. Provision is made for the exemption of indigent natives not able to earn, of natives whose permanent residence is outside the Union, and of natives attending approved educational institutions and thus not earning any wages which would enable them to pay the tax.

If a native pays income tax amounting to not less than one pound to the government of the Union, he is exempted from paying the general tax; if he pays income tax amounting to less than one pound, his general tax is reduced by the amount so paid by him.

The amounts collected from native taxation are allocated as follows: local taxes and quitrent in the particular areas in which they are collected are paid to the native local councils within those areas. If there is no local council in any area, the local taxes and quitrent are paid into an account styled the native development account. Into this account, also, is paid one-fifth of the amount of the general tax.

The object of the native development account is to apply the amounts standing to the credit of the account, at the discretion

<sup>1</sup> As amended by Acts No. 28 of 1926 and No. 37 of 1931.



of the minister, in consultation with the native affairs commission, to the maintenance, extension and improvement of educational facilities amongst natives, and to their further development, advancement and welfare.

## 2. Tribal Levies

Prior to 1925 there had been a system in the Transvaal whereby the government could make a levy on all members of a tribe, at the request of the majority of that tribe, to subscribe towards a trust fund for the purposes of the tribe, usually the purchase of land or stock. This system became very popular amongst and had the most beneficial results for the natives, and has been extended to the whole of the Union by section 15 of the Natives Taxation and Development Act, 1925. The section reads as follows:

15. (1) Whenever a native tribe or community voluntarily makes application for the levy of a special rate for the benefit of such tribe or community and the Minister is satisfied that the majority of taxpayers of such tribe or community desires such a levy and the Minister approves the purpose for which it is to be imposed, the Governor-General may levy such rate upon the whole tribe or community and such rate shall be recoverable as if it were a tax imposed under this Act.

(2) The proceeds of any such rate as is levied under sub-section (1) of this section shall be paid into a special account in the name of the tribe or community concerned to be administered by the Minister in accordance with regulations made under this Act.

The minister causes a publication to be made in the *Gazette* of the decision to make a levy, and the following is the form in which the proclamation is made:

### PROCLAMATION

By LIEUTENANT-COLONEL HIS EXCELLENCY THE RIGHT HONOURABLE THE EARL OF CLARENDON, A MEMBER OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL, KNIGHT GRAND CROSS OF THE MOST DISTINGUISHED ORDER OF SAINT MICHAEL AND SAINT GEORGE, GOVERNOR-GENERAL AND COMMANDER-IN-CHIEF IN AND OVER THE UNION OF SOUTH AFRICA.

[No. 233, 1931.]

#### LEVY OF SPECIAL RATE ON COMMUNITY OF NATIVES UNDER HEADMAN CETYWAYO BOYANA

WHEREAS the community of natives under Headman Cetywayo Boyana resident in the location called Bolotwa, in the District of

Glen Grey, have made application for the levy of a special rate for the purpose of providing funds for the fencing of arable allotments in that location ;

AND WHEREAS the Minister of Native Affairs is satisfied that the majority of the taxpayers of the community desire such a levy, and approves of the purpose for which it is to be imposed ;

Now, therefore, I, under and by virtue of the powers vested in me by section *fifteen* (1) of the Natives Taxation and Development Act, No. 41 of 1925, do hereby proclaim, declare and make known, that a special rate of £4 sterling is hereby levied on every taxpaying member of the said community.

The special rate hereby levied shall be payable in three annual instalments of two pounds (£2), one pound (£1) and one pound (£1) respectively, and the first instalment shall be due and payable on the 1st October, 1931, the second instalment on the 1st October, 1932, and the third instalment on the 1st October, 1933.

GOD SAVE THE KING.

Given under my Hand and the Great Seal of the Union of South Africa at Capetown this Twenty-sixth day of May One thousand Nine hundred and Thirty-one.

CLARENDON,

*Governor-General.*

By Command of His Excellency the  
Governor-General-in-Council.

E. G. JANSSEN.



PART VIII

THE EXTERNAL RELATIONS OF THE UNION



## XXVIII

### RELATIONS WITH THE BRITISH COMMONWEALTH NATIONS AND FOREIGN NATIONS

#### 1. Status

WE have already seen that there formerly existed certain limitations on the sovereignty of the Union parliament, and that the Statute of Westminster removed those limitations and placed the dominions as near as may be on a footing of equality with the United Kingdom. Up to the Peace Treaty of 1919, the status of the dominions was that between absolute subordination and sovereign independence. It was a great deal above the former and a long way from the latter. Slow but inevitable changes, however, were taking place in the constitutional relations of the dominions with the mother country. The dominions kept on asking from time to time for a greater degree of autonomy, and this was always granted when the demand appeared to be serious. The practical situation was that the dominions could obtain any amount of autonomy which they earnestly desired. It was perfectly understood that neither the cabinet nor the parliament at Westminster would resist such a demand, and hence the nature of the connexion with the United Kingdom was inevitably determined by the progressive wishes of the dominions themselves.

Whenever any dominion obtained a concession or right, the concession was automatically extended to all the other dominions. It is important to understand that this extension was based not so much on the fact that a precedent had been created, but on the principle of the equality of status of the dominions. Whatever tended to raise the status of one dominion operated in an equal degree to raise the status of each of the other dominions. This equality of status of all the dominions was rigidly and jealously maintained. It was in each dominion held to be a cardinal principle. But it did not apply to the United Kingdom, whose status, definitely, was higher than that of a dominion.

The Peace Treaty, 1919, marked the beginning of the new

status, that is, of a status equal to that of the United Kingdom. The rise in status, like economic development, is a process of growth. Originally a savage wilderness, each dominion had become a populous, thriving community, to which the great war had given an impetus in constitutional and economic development. The dominions emerged from that war not only wealthier and more independent economically than they had ever been before, but also with a new sense of nationhood born of their sacrifices. At the peace conference they considered themselves of an international status at least equal to that of the minor belligerent states. Depleted as were the resources of the greater powers, it became more difficult for them to resist the demands for recognition of these vigorous young communities beyond the seas who had contributed so much to the allied cause in every arena of the world.

The peace treaty was signed by the United Kingdom generally for the British Empire and by the dominions specifically for themselves. The signature for the British Empire represented older ideas of sovereignty, while the separate signatures for the dominions marked the beginning of a new idea—the real sovereignty and national independence of each dominion.

The period from 1919 to 1926, from the signing of the peace treaty by the dominions to the publication of the Inter-Imperial Relations Report, was a period of transition from dominion status to independent status. The dominions had ceased to be colonies in any sense of the word; they were transition states. Transition states must be described, rather than defined. There is a passage in the third edition of Oppenheim's work on international law, written before the Inter-Imperial Relations Report, which aptly describes this last stage of transition:

'Formerly the position of self-governing Dominions, such as Canada, Newfoundland, Australia, New Zealand, and South Africa, did not in international law present any difficulties. They had no international position whatever, because they were, from the point of view of international law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps or the like. Nor did they become subjects of international law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to the administrative unions, such as

the Universal Postal Union. Even when they were empowered by the mother country to enter into certain treaty-arrangements of minor importance with foreign states, they still did not thereby become subjects of international law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them. But the position of self-governing Dominions underwent a fundamental change at the end of the World War. Canada, Australia, New Zealand, South Africa, and also India, were not only separately represented within the British Empire delegation at the Peace Conference, but also became, side by side with Great Britain, original members of the League of Nations. Separately represented in the Assembly of the League, they may, of course, vote there independently of Great Britain. Now the League of Nations is not a mere administrative union like the Universal Postal Union, but the organised family of Nations. Without doubt, therefore, the admission of these four self-governing Dominions, and of India, to membership, gives them a position in international law. But the place of self-governing Dominions within the family of Nations at present defies exact definition, since they enjoy a special position corresponding to their special status within the British Empire as "free communities, independent as regards all their own affairs, and partners in those which concern the Empire at large".<sup>1</sup> Moreover, just as, in attaining to that position, they have silently worked changes, far-reaching but incapable of precise definition, in the constitution of the Empire, so that the written law inaccurately represents the actual situation, in a similar way they have taken a place within the family of Nations, which is none the less real for being hard to reconcile with precedent. Furthermore, they will certainly consolidate the position which they have won, both within the Empire and within the family of Nations.<sup>1</sup>

Bound up with the discussion of status are the questions of independence and neutrality. With the passing of the Statute of Westminster, the dominions may be deemed for all purposes but war to be independent states.

"The marks of an independent state are, that the community constituting it is permanently established for a political end; that it possess a defined territory; and that it is independent of external control. . . . So soon as a society can point to the necessary marks, and indicates its intention of conforming to law, it enters of right into the family of states, and must be treated according to law. The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in conformity with the dictates of international law, and, finally, that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law. . . . A state

<sup>1</sup> L. Oppenheim, *International Law* (3rd ed., London, sections 94 a and 94 b.)



in its perfect form has, in virtue of its independence, complete liberty of action, subject to law, in its relation with other states. This applies to states linked by a personal union. A personal union exists, as in the instance of Great Britain and Hanover from 1714 to 1837, when two states, distinct in every respect, are ruled by the same prince; and they are properly regarded as wholly independent states who merely happen to employ the same agent for a particular class of purposes, and who are in no way bound by or responsible for each other's acts. . . . But it does not apply to members of a federal state, because the distinguishing marks of a federal state upon its international side consist in the existence of a central government to which the conduct of external relations is confided.<sup>1</sup>

The dominions in every way conform to the requirements of independent states as laid down in this statement. They are permanently established for a political end; they each possess a defined territory; they are independent of external control; they may be expected to exist for an indefinite period of time. And it does not matter that some functions are carried on for the dominions by the United Kingdom, such as legislation by the British parliament for some dominions or communication with foreign powers through the secretary of state for the dominions and the British ambassadors. The exercise of these functions by delegation, 'is a matter of convenience, of consent, of mutual agreement, and not evidence of subordination on the part of one partner in the empire to another'.<sup>2</sup> For states may curtail their external or international functions by an alliance, or by a treaty of protection, or by an understanding to conform to a certain course of action, as in the case of the Britannic states, without thereby ceasing to be sovereign.<sup>3</sup>

According to international law, therefore, the dominions are independent because they are at liberty, if they so wish, to exercise every function of national or international right. It remains to be shown how their independence has been recognized. Once independence is recognized, such recognition is absolute and irrevocable. It marks the beginning of a state in international law. Although the right to be treated as a state

<sup>1</sup> W. E. Hall, *International Law* (8th ed., ed. Higgins, Oxford, 1924), pp. 16 ff. For a federal state as referred to by Hall, the United States and the German empire under the constitution of 1871 afford examples.

<sup>2</sup> Secretary of state for the dominions, Hansard, March 8, 1928. Cf. A. B. Keith, *The Constitutional Law of the British Dominions* (London, 1933).

<sup>3</sup> Cf. Bodin, *De la republique*, Book I, chapter viii; Grotius, *De jure Belli ac Pacis*, i. 317.

is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Hall's latest edition states the position with clarity:

"The commencement of a state dates from its recognition by other powers; that is to say, from the time at which they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between states alone. For though no state has a right to withhold recognition when it has been earned, states must be allowed to judge for themselves whether a community claiming to be recognized does really possess all the necessary marks, and especially whether it is likely to live. . . . The admission of a state to membership of the League of Nations carries with it *de jure* recognition by all other members. Poland and Czecho-Slovakia received recognition by being admitted as parties to the Treaty of Versailles in 1919. . . . New states generally come into existence by breaking off from an actually existing state. Recognition is accorded either by the parent country or by a third power. Recognition by a parent state, by implying an abandonment of all pretensions over a community, is more conclusive evidence of independence than recognition by a third power, and it removes all doubts from the minds of other governments as to the propriety of recognition by themselves. But it is not a gift of independence; it is only an acknowledgement that the claim made by the community to have definitely established its independence, and consequently to be in possession of certain rights, is well founded."<sup>1</sup>

Thus it would appear that the dominions received recognition as independent states by being admitted as parties to the Treaty of Versailles in 1919. Admission to the League of Nations also was a certain measure of recognition of independence. The appointment of ministers plenipotentiary by Canada, the Union of South Africa, and the Irish Free State was recognition of independence. Finally, the Statute of Westminster, 1931, was an abandonment by the United Kingdom of all pretensions over the dominions and an outright declaration to the world of their independence. To the argument that the parliament of the United Kingdom 'cannot limit the powers of a successor', the obvious answer is that legal impossibility is made ineffectual if the Commonwealth is to endure. In the Union it is fully recognized that, as Professor Keith says, 'the Dominions are sovereign international states in the sense that the King in respect of each of his Dominions . . . is such a state in the eyes of international law' and that by enacting the Statute of Westminster the parliament of the United Kingdom has declared 'a constitutional principle which

<sup>1</sup>Hall, *International Law*, p. 104.

will be far more binding than any mere law'.<sup>1</sup> 'The Commonwealth has not been weakened by the passing of the Statute of Westminster. It is a vital and living association of states which will develop by the driving forces of circumstances, tradition, and relationship into an empire far nobler than any the world has known.

The questions of secession of a dominion from the British Empire and of neutrality are not legal but political questions. In the theory of law no dominion can declare itself free from the control of the British parliament; and no British subject can do any act weakening the King's power, but in a time of political revolution theories of law go by the board, and no purpose would be served in discussing them here. With regard to the right of a dominion to remain neutral while the rest of the Empire is at war, it is sufficient to state that when the King declares war, all his territories and dominions are at war. There is no recognition of the divisibility of the legal position of the King.<sup>2</sup>

The status of the dominions is dealt with in the Inter-Imperial Relations Report of 1926 as follows:

'They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the crown, and freely associated as members of the British Commonwealth of Nations. . . . Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever. . . . Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations. But the principles of equality and similarity, appropriate to status, do not universally extend to

<sup>1</sup> A. B. Keith, *Speeches and Documents on the British Dominions, 1918-1931: From Self-Government to National Sovereignty* (The World's Classics, Oxford, 1932), p. xxx.

<sup>2</sup> It is the opinion of General Hertzog that the Union has the right of secession and of neutrality when Great Britain is at war. He also thinks that the crown is divisible, and that the position is not unlike that during the personal union of the crowns of Great Britain and Hanover from 1714 to 1837. See H. J. Schlosberg, *The King's Republics*, p. 20, where this view is developed. General Smuts disagrees with General Hertzog on each of the three points. In view of the conflict of opinion held by authorities, the authors have preferred to state the position according to the conservative view and have purposely refrained from entering into what still must be a political discussion. The most that can be said is that it is possible that the divisibility of the crown may be illustrated if another European war should take place.

function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can from time to time be adapted to the changing circumstances of the world. . . .’

In the preamble of the Status of the Union Act, 1934, which is printed in Appendix VII of this book, the first sentence of the above statement is cited, and the phrase ‘sovereign independent state’ is used.

## 2. The Imperial Conferences

The representatives of the Britannic states and India meet at intervals of about four years to discuss or consult on questions affecting the Empire.

‘They meet there on terms of equality under the presidency of the first minister of the United Kingdom. They meet there as equals; he is *primus inter pares*; ministers from six nations sit around the council board, all of them responsible to their respective parliaments and to the people of the countries which they represent. Each nation has its voice upon questions of common concern and highest importance as the deliberations proceed, each preserves unimpaired its perfect autonomy, its self-government, and the responsibility of its ministers to its own electorate.’

In these words of Sir Robert Borden can be seen the real reason of the impotency of the Imperial Conferences. They have no power, for they have no instruments for executive action. They can do nothing more than recommend; and any dominion that chooses to pursue some particular course of its own, and to disregard the recommendations of a particular Imperial Conference, can do so with impunity.

An Imperial Conference has only an indirect influence on the legislative and executive bodies of the states represented there. An endeavour has always been made to carry the resolutions submitted to the conference unanimously. Up to the present, there has only been one important exception to unanimity. This occurred in 1921 when South Africa dissented from the Indian Resolution. General Smuts then expressed the view that it was of fundamental importance that none but unanimous resolutions should be carried. If a conference could not arrive at unanimity on any resolution, it should not pass that resolution.

But even when a resolution is passed unanimously it may still fail to be effective. As Mr. Baldwin said, on November 9, 1923:

'The purpose of the Imperial Conference is not to frame absolute and binding resolutions. The conclusions reached are naturally subject to any action which may be taken later on.' At the Economic Conference of 1923, sitting in conjunction with the Imperial Conference, a scheme was devised and unanimously approved for granting a limited measure of imperial preference. All the representatives pledged themselves to submit this scheme to their respective parliaments for adoption; but before most of the dominion representatives had reached home, a general election in the United Kingdom brought a new government into office with a policy directly in opposition to that of granting preferences. The pledge of submitting the scheme to parliament was fulfilled, but parliament refused to adopt the proposal, for the general election was fought and lost on that issue.

The risk of the non-ratification of the resolutions is the greater because the prime minister whom each dominion sends as its representative is a party leader, though at the Imperial Conference he represents, not his own party, but his whole country, yet he cannot always rely on the support of any party but his own. It would perhaps add much to the value of any future Imperial Conferences if it were found practicable for each prime minister to be accompanied by some trusted member selected by the opposition. Political jealousies and party differences should not interfere with high and creative purposes. However, local exigencies seem too often to obscure wider horizons.

The Imperial Conference meets at long intervals. No machinery for continuous consultation to deal with urgent matters as they arise has yet been devised, except that Mr. Baldwin, on November 20, 1924, on taking office as prime minister, said that he would periodically assemble the dominion high commissioners in London to meet the foreign secretary, the colonial secretary, and himself, so as to keep the dominions authoritatively informed of the progress of foreign affairs.<sup>1</sup> There is interchange

<sup>1</sup> The dominions have never claimed any position to advise or to be consulted in connexion with the colonies and protectorates. Cf. the Duke of Devonshire at the Imperial Conference, 1923: 'The Colonies and Protectorates are the immediate responsibility and trust of the British Government.' The Irish Free State representative added 'the Mandated Territories and Protectorates which are controlled by the British Government give no responsibility to the Imperial Conference'.

of views between the government of Great Britain and the dominions, but the difficulty is that the dominions are mainly negative in their attitude to all which do not directly affect them, and thus render action difficult. It is desirable to arrange a closer personal touch between Great Britain and the dominions, and between the dominions *inter se*. Such contact alone can convey an impression of the atmosphere in which official correspondence is conducted. A new system of consultation is urgently required.

'By reason of his constitutional position', declares the Inter-Imperial Relations Report, 1926, 'the Governor-General is no longer the representative of His Majesty's Government in Great Britain. There is no one, therefore, in the Dominion capitals in a position to represent with authority the views of His Majesty's Government in Great Britain. . . . The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Governments, with due regard to the circumstances of each particular part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government, and the special arrangements which have been in force since 1918 for communications between Prime Ministers.'<sup>1</sup>

### 3. The Principle of Consultation

In law the crown acts as the delegate or representative of the state in the conduct of foreign affairs, and what is done in such matters by means of the royal prerogative is the act of the state, and, according to international law, is binding upon the latter without further sanction. The crown enjoys the sole right of appointing ambassadors, diplomatic agents, consuls and other officers, through whom intercourse with foreign nations is conducted; of making treaties, declaring peace and war, and generally of conducting all foreign relations. Such matters are entrusted to the absolute discretion of the sovereign acting through the recognized constitutional channels upon the advice of the cabinet, whether that of the United Kingdom or of a dominion, unfettered by any direct supervision, parliamentary or otherwise.

<sup>1</sup> *Inter-Imperial Relations Report, 1926*, part vi.

An indirect means of control is, however, supplied by the customary or conventional law of the constitution relating to the cabinet system, the doctrine of ministerial responsibility, and the fear of loss of office or national censure. Moreover, it is recognized as a constitutional maxim or convention that declarations of peace and war and the conduct of foreign relations must be in conformity with the wishes of parliament, and in certain cases treaties require special parliamentary sanction.<sup>1</sup> This is the position which governs the foreign relations of the British Commonwealth of Nations. Each dominion is generally free to conduct its own foreign policy, to negotiate its own treaties, and generally to act in relation to foreign states in any way it pleases, except with regard to a declaration of war. But it is the policy of each dominion and of the United Kingdom to act in such a way as to maintain as far as possible a common policy. This has become an understanding or convention. This convention or understanding is based upon the principle that diplomatic unity ought to be maintained. 'Understanding' is a better term to use than 'convention', for this 'understanding', unlike 'conventions of the constitution', has no real sanction. If it is not adhered to, there is nothing to force any British state to adhere to it.

At one time the unity of the Empire in foreign affairs was complete. No foreign power recognized a dominion as a political state; no foreign power approached a dominion government to obtain redress for any injury done. When the Vancouver riots in 1907 resulted in damage to Japanese and Chinese property, the formal request for redress was made, not direct to Canada, but to the British government. In 1905, and in the following years, when the government of Newfoundland interfered with the fishing rights of the United States, the government of that country addressed its representation to London. This diplomatic unity of the British Empire prevailed up to the end of the Great War. But there had been growing in the dominions certain misgivings of definite commitments by the British Government. The dominions, not really menaced by any external militarist danger, began to examine a system of inter-imperial relations which might commit them to European entanglements, even though they generally approved of the efforts of the United

<sup>1</sup> Cf. notes A and B at the end of this chapter.

Kingdom to maintain peace in Europe. The dominions were perhaps unconscious of international responsibility. They were preoccupied with their own domestic problems and intent on the development of their own empty spaces. The problems of Europe presented no aspect which vitally affected them.

At first the dominions were content to allow the British government to conduct foreign affairs on its own responsibility. Then a demand arose that where the special interests of a dominion were concerned, no action should be taken until there had been consultation with the dominion concerned. Thus arose the understanding of 'consultation'. But it soon came to pass that where any matter concerned a dominion more vitally than even the United Kingdom, that dominion demanded a liberty of action in such matter equivalent to the liberty of action of the United Kingdom in Europe. The dominions resented the interference of the British foreign office in those regions of international politics where they alone were concerned. There thus arose a conflict of interests.

The British government in London must inevitably think more about peace and co-operation throughout its vast field of contacts than of the interests of any particular dominion. The dominions, on the other hand, are really more concerned about being left out of international affairs, unless their own interests are directly affected, and then they prefer to manage them in their own way. They are not anxious to assume obligations in which they have no interests; whereas the United Kingdom, with her wide and complex connexions, cannot limit her engagements to what the dominions will accept. Each Britannic state, therefore, finds no alternative but that of complete liberty and independence of action in foreign affairs. The diplomatic unity of the Empire is thus no longer a fixed and immutable principle. But there continues to exist a generally prevailing desire that there should be a joint foreign policy for the British Commonwealth.

At the first meeting of the imperial war cabinet of 1917, it was agreed that the policy of the British Empire should be one, and should be the outcome of consultation between the six governments of which the imperial war cabinet was composed. Since the Peace Conference it has been a primary axiom of British external policy that the British government could not



enter into engagements of imperial concern without the consent of the other Britannic states. The failure by the British government to act in accordance with this understanding was the cause of the controversies about Chanak and the Lausanne Treaty. But however desirable such a state of affairs might be, the difficulty arose as to how a dominion should act if it could under no circumstances accept a treaty or obligation accepted by the rest of the Empire. The solution was provided in the Locarno Treaty of 1925. This treaty was a departure from the theory of diplomatic unity enunciated by the imperial war cabinet in 1917. It was a departure in favour of the system contemplated in the Anglo-American Treaty of Guarantee to France in 1919, never actually brought into force. The system contemplated in 1919 was that the United Kingdom, in matters affecting Europe, even of the first importance, will proceed, no doubt after giving all information possible to the dominions by cable and dispatch, to negotiate treaties which were to be binding on herself, but which impose no obligation on any dominion unless the dominion afterwards accepted the treaty. Article 9 of the Locarno Treaty provided that: 'The present treaty shall impose no obligation upon any of the British Dominions, or upon India, unless the Government of such Dominion, or of India, signifies its acceptance thereof.' Though the Locarno system was severely attacked, it has provided the formula by which only dominions may be bound by a treaty entered into by the United Kingdom.

The understanding or the principle of consultation has not been abandoned. The Inter-Imperial Relations Report contains the following important paragraph:

'It was agreed in 1923 that any of the governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other governments, and should take steps to inform governments likely to be interested of its intention. This rule should be understood as applying to any negotiations which any government intends to conduct, so as to leave it to the other governments to say whether they are likely to be interested. When a government has received information of the intention of any other government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating government receives no adverse comments, and so long as its policy involves no active obligations on the part of the other governments, it may proceed on the

assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other government in any active obligations, obtain their definite assent. Where by nature of the treaty it is desirable that it should be ratified on behalf of all the governments of the Empire, the initiating government may assume that a government which has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification of the treaty. In the case of a government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorized to act on its behalf, it will advise the appointment of a plenipotentiary so to act.<sup>1</sup>

These rules have been amplified in the *Report of the Imperial Conference of 1930*:

'Previous Imperial Conferences have made a number of recommendations with regard to the communication of information and the system of consultation in relation to treaty negotiations and the conduct of foreign affairs generally. The main points can be summarized as follows:

- (1) Any of His Majesty's governments conducting negotiations should inform the other governments of His Majesty in case they should be interested and give them the opportunity of expressing their views, if they think that their interests may be affected.
- (2) Any of His Majesty's governments on receiving such information should, if it desires to express any views, do so with reasonable promptitude.
- (3) None of His Majesty's governments can take any steps which might involve the other governments of His Majesty in any active obligations without their definite assent.

'The Conference desired to emphasize the importance of ensuring the effective operation of these arrangements. As regards the first two points, they made the following observations:

'(i) The first point, namely, that of informing other governments of negotiations, is of special importance in relation to treaty negotiations in order that any government which feels that it is likely to be interested in negotiations conducted by another government may have the earliest possible opportunity of expressing its views. The application of this is not, however, confined to treaty negotiations. It cannot be doubted that the fullest possible interchange of information between His Majesty's governments in relation to all aspects of foreign affairs is of the greatest value to all the governments concerned.

'In considering this aspect of the matter, the Conference have taken note of the development since the Imperial Conference of 1926 of the system of appointment of diplomatic representatives of His Majesty representing in foreign countries the interests of different members of the British Commonwealth. They feel that such appointments furnish

<sup>1</sup> *Inter-Imperial Relations Report, 1926, part v (a).*

a most valuable opportunity for the interchange of information, not only between the representatives themselves but also between the respective governments.

Attention is also drawn to the resolution quoted in Section VI of the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, with regard to the development of a system to supplement the present system of inter-communication through the official channel with reference not only to foreign affairs but to all matters of common concern. 'The Conference have heard with interest the account which was given of the liaison system adopted by His Majesty's government in the Commonwealth of Australia, and recognized its value. Their attention has also been called to the action taken by His Majesty's government in the United Kingdom in the appointment of representatives in Canada and the Union of South Africa. They are impressed with the desirability of continuing to develop the system of personal contact between His Majesty's governments, though, of course, they recognize that the precise arrangements to be adopted for securing this development are matters for the consideration of the individual governments with a view to securing a system which shall be appropriate to the particular circumstances of each government.

'(ii) As regards the second point, namely, that any of His Majesty's governments desiring to express any views should express them with reasonable promptitude, it is clear that a negotiating government cannot fail to be embarrassed in the conduct of negotiations if the observations of other governments who consider that their interests may be affected are not received at the earliest possible stage in the negotiations. In the absence of comment the negotiating government should, as indicated in the Report of the 1926 Conference, be entitled to assume that no objection will be raised to its proposed policy.'<sup>1</sup>

The present position is a direct consequence of the theory of full ministerial responsibility in the dominions. If it was open to a dominion government to reply to a request from the British government for redress to a foreign state with the answer that the ministry would not accord it, but would resign, and that no other ministry would take office, no other alternative was left but to grant the dominions full liberty in their international relations. But, using the words of Professor Keith: 'If it is the duty of a Dominion not to adopt the policy of a California and defy imperial obligations, it is no less the duty of the British government to see that none of its actions shall run counter to the interests of a Dominion; nor in truth can the British government be fairly charged with lack of appreciation of this view. The fact that Canada and the other Dominions respect the

<sup>1</sup> *Report of the Imperial Conference, 1930.*

obligations of treaties as religiously as the Imperial government itself is indeed a good augury for the future of the Empire."<sup>1</sup>

Each Britannic state informs the others constantly as to the trend of foreign events, and invites from them by this system of voluntary information any representations which they may wish to make.

#### 4. The Channels of Communication between Dominion Governments and Foreign Governments

The department of external affairs is the channel of communication between the government of the Union of South Africa and the governments of other countries. In the case of the United Kingdom, communications are sometimes addressed by the minister of external affairs to the secretary of state for the dominions; sometimes communications are sent through the Union high commissioner in London, or through the high commissioner for the United Kingdom in Pretoria. Communications with other governments of the British Commonwealth are addressed by the minister of external affairs to the prime minister or the minister of external affairs of the dominion concerned. Communications with foreign governments are directed by the minister of external affairs to the government concerned through (a) the Union minister in such foreign country; or (b) the diplomatic representative of such foreign country in the Union; or (c) His Britannic Majesty's diplomatic representative in such foreign country where the Union is not represented in such foreign country.<sup>2</sup>

Communications relating to the native territories in South Africa are directed by the department of external affairs to the British High Commissioner for South Africa in Pretoria. Communications with South-West Africa or the League of Nations regarding the administration of the mandate are sent through the prime minister's department, the administration of the mandate being a function of that department. Communications with His Majesty the King, such as the tendering of advice in matters affecting the Union are sent to the governor-general of the Union, who, as we have stated, is the king's personal representative in the Union.

<sup>1</sup> *Responsible Government in the Dominions* (London, 1906), p. 288.

<sup>2</sup> *Report of the Imperial Conference, 1930*, part vi (i).

The Imperial Conference, 1930, laid down some working principles:

'At the Imperial Conference of 1926 it was agreed that, in cases other than those where Dominion ministers were accredited to the heads of foreign states, it was very desirable that the existing diplomatic channels should continue to be used, as between the Dominion governments and foreign governments, in matters of general and political concern. While the Conference did not wish to suggest any variation in this practice, they felt that it was of great importance to secure that the machinery of diplomatic communication should be of a sufficiently elastic and flexible character. They appreciated that cases might arise in which, for reasons of urgency, one of His Majesty's governments in the Dominions might consider it desirable to communicate direct with one of His Majesty's ambassadors or ministers appointed on the advice of His Majesty's government in the United Kingdom on a matter falling within the category mentioned. In such cases they recommended that the procedure just described should be followed. It would be understood that the communication sent to the ambassador or minister would indicate to him that, if practicable, he should, before taking any action, await a telegram from His Majesty's government in the United Kingdom, with whom the Dominion government concerned would simultaneously communicate. As regards subjects not falling within the category of matters of general and political concern, the Conference felt that it would be to the general advantage if communications passed direct between His Majesty's governments in the Dominions and the ambassador or minister concerned. It was thought that it would be of practical advantage to define, as far as possible, the matters falling within this arrangement; the definition would include such matters as, for example, the negotiation of commercial arrangements affecting exclusively a Dominion government and a foreign power, complimentary messages, invitations to non-political conferences, and requests for information of a technical or scientific character. If it appeared hereafter that the definition were not sufficiently exhaustive it could of course be added to at any time. In making the above recommendations, it was understood that . . . cases might also arise in which His Majesty's governments in the Dominions might find it convenient to adopt appropriate channels of communication other than that of diplomatic representatives. The Conference were informed that His Majesty's government in the United Kingdom were willing to issue the necessary instructions to the ambassadors and ministers concerned to proceed in accordance with the above recommendations.'

## 5. Diplomatic Representation

Ministers-plenipotentiary are formally appointed by His Majesty the King. In accordance with diplomatic practice a minister is appointed by means of a letter of credence from His

Majesty to the head of the state concerned. In the Union of South Africa a foreign ambassador presents his credentials to the governor-general as the personal representative of the King. For example, the procedure in the case of the minister from the United States was as follows:

'The American Minister was received by His Excellency the Governor-General at Government House, Pretoria, on the 8th September, 1930. The American Minister presented his Letters of Credence addressed by the President of the United States of America to His Majesty the King, and as from 8th September, 1930, assumed his duties and functions as Envoy Extra-ordinary and Minister-Plenipotentiary of the United States of America in the Union of South Africa.'<sup>1</sup>

The Union has, at the moment, ministers-plenipotentiary at Washington, Rome, The Hague, Paris and Berlin.

Foreign consuls within the Union present no credentials personally to the Governor-General, but they require recognition in a formal manner. The method of such recognition is by a formal notice in the *Gazette* in the following terms:

'His Excellency the Governor-General has been pleased to approve of the grant of recognition to Monsieur Vladas Karolis Račkauskas as Consul of Lithuania at Capetown, with jurisdiction over the Union of South Africa and the Mandated Territory of South-West Africa.'

Diplomatic immunity is granted in the Union of South Africa to the diplomatic agents of foreign countries by express enactment, which provides that no diplomatic agent, his family, staff and their families, and his alien servants, shall be subject to the civil and criminal jurisdiction of any court in the Union, and all legal processes sued out against the person or property of any diplomatic agent shall be void.<sup>2</sup> Immunity, however, does not extend to diplomatic agents engaged in trade or other callings in the Union in so far as transactions in that trade or calling are concerned. Diplomatic agents are entitled to waive the immunity granted them under the statute. The proper minister may exempt diplomatic persons and official legation buildings and residences from taxes and rates if a reciprocal exemption is granted to the diplomatic agents of the Union. Diplomatic immunity is further protected by the fact that if any person without reasonable care sues out a legal process against a foreign

<sup>1</sup> *The Government Gazette*, September 12, 1930.

<sup>2</sup> Diplomatic Immunities Act, No. 9 of 1932, as amended by Act No. 19 of 1934.

diplomatic agent accredited to the Union such person may suffer severe criminal punishment.

The Union maintains a high commissioner and staff in London, and the United Kingdom has a high commissioner at Pretoria, who is also high commissioner for the native territories. Communications from the Union government are occasionally addressed to either of these high commissioners for transmission to the British government.

The status of high commissioners was reviewed by the Imperial Conference, 1930:

*'The question of precedence of High Commissioners for the Dominions in London was raised at the Imperial Conference of 1923 by the then Prime Minister of Canada. As a result of the discussion at that Conference and subsequent correspondence with the Prime Ministers of the Dominions, a proposal was submitted to, and approved by the King, that the Dominion High Commissioners should be given precedence, on ceremonial occasions, after any members of the United Kingdom or Dominion Cabinets who might be present on any given occasion, but not in any case given a position superior to that accorded by the United Kingdom Table of Precedence to Secretaries of State.*

*'At the present Conference the question was raised whether it might be possible in any way to improve the status accorded, as a result of the 1923 discussions, to Dominion High Commissioners in London in order to emphasize the importance of their position as the representatives in London of other governments of His Majesty. The desirability of such action, if it were possible, was generally recognized, more particularly in view of the constitutional position as defined by the Imperial Conference of 1926.*

*'On the other hand, there was obvious difficulty in according to the representatives in London of any of His Majesty's governments a status which would place them in a position higher than that accorded, not only to His Majesty's principal Ministers in the United Kingdom, but also to the members of the respective Dominion governments when they were visiting the United Kingdom.*

*'As the result of the discussion, His Majesty's government in the United Kingdom intimated that they were prepared to recommend to the King that the Dominion High Commissioners should on all ceremonial occasions (other than those when Ministers of the Crown from the respective Dominions were present) rank immediately after Secretaries of State, that is, before all Cabinet Ministers in the United Kingdom, except Secretaries of State and those Ministers who already have higher precedence than Secretaries of State. It had been ascertained that, if such a recommendation were made to the King, His Majesty would be graciously pleased to approve it. As regards the position of the representative of a Dominion in relation to a Minister of the Crown visiting*

the United Kingdom from that Dominion, the existing position would remain unaltered, that is, normally a Minister of the Crown from a Dominion visiting the United Kingdom would be given precedence immediately before the High Commissioner concerned.

'The representatives of the United Kingdom at the Conference expressed the hope that His Majesty's governments in the Dominions would consider the question of recommending equivalent precedence for any High Commissioner appointed by His Majesty's government in the United Kingdom in a Dominion.'

## 6. Treaties

The dominions, as have seen, have long possessed the undisputed control of their own internal affairs. But one cannot draw an absolute line between what is domestic and what is foreign. In 1859 the province of Canada passed an act increasing the duties on imported goods, including those coming from the United Kingdom. This, of course, affected not only the people of Canada, but also those of the Empire as a whole, as well as foreign countries. In spite, however, of the strenuous opposition of certain British manufacturers, the British government, after a firm protest from the Canadian ministry, consented to the imposition of the tariff, and the right of a self-governing colony to determine the tariff on both foreign and British goods was thereby established. In 1854 a reciprocal trade-treaty between Canada, acting as British plenipotentiary, and the United States had already been concluded, but this treaty was directly arranged by the governor-general of Canada and all interests were considered. It, however, formed a precedent, and together with the act of 1859 laid foundations for the principle of leaving the self-governing colonies free to manage their own trade relations.

But this right of controlling their own commercial relationship with the outside world had always been subject to an important reservation or understanding. The colonies had outgrown the condition in which each of them could be regarded as an isolated community. Trade ramifications became too complicated not to be affected by any single treaty. An understanding arose that in any commercial treaty in which a Britannic state took part, the other Britannic states, not parties to the treaty, should always receive equal treatment with any other nation. No foreign country was to receive more favourable concessions than any of His Majesty's dominions might receive.



From the very first the British government regarded it essential that any tariff concessions conceded by a dominion to a foreign country should be extended to the United Kingdom and to the rest of his majesty's dominions. When Newfoundland in 1890 had made arrangements for a treaty with the United States which would have accorded preferential treatment to that power, the secretary of state for the colonies, in a dispatch of March 26, 1892, informed the government of Canada, in reply to its protest, that it might rest assured 'that Her Majesty will not be advised to assent to any Newfoundland legislation discriminating directly against the products of the Dominion'.

In 1894 the Colonial Conference held at Ottawa discussed the principles which were to apply to commercial treaties. They were definitely laid down by the colonial secretary, Lord Ripon, in a dispatch dated June 28, 1895:

'Any agreement made must be an agreement between Her Majesty and the sovereign of a foreign state, and it would be to Her Majesty's government (in the United Kingdom) that the foreign states would apply in case of any questions arising out of the agreement. To give the colonies power of negotiating treaties for themselves without reference to Her Majesty's government would be to give them an international status as separate and sovereign states, and would be equivalent to breaking up the Empire into a number of independent states, a result injurious to the colonies and to the mother country, and one that would be desired by neither party. The negotiations, therefore, between Her Majesty and the foreign sovereign must be conducted by Her Majesty's representative at the foreign court, who would keep Her Majesty's government informed of the progress of the discussion, and seek instructions from them as necessity arose. In order to give due help in the negotiations, Her Majesty's representative should, as a rule, be assisted by a delegate, appointed by the colonial government, either as plenipotentiary or in a subordinate capacity, as the circumstances might require. If, as a result of the negotiations, any arrangements were arrived at, they would require approval by Her Majesty's government and by the colonial government, and also by the colonial legislature if they involved legislative action, before the ratification could take place. This procedure has been in the past adopted, and Her Majesty's government had no doubt as to its propriety, as securing at once the strict observance of existing international obligations, and the preservation of the unity of the Empire.'

Since 1894 the dominions have moved onward in their commercial relations. They now negotiate commercial treaties by dealing direct with the foreign country concerned. The United

States deals directly with Canada in commercial matters, and so does Portugal with South Africa, while the recent trade agreement between Germany and South Africa was entered into without the intervention of the United Kingdom.

It is true that in the past the British government has intimated that she would not agree to a colony asking from foreign powers concessions hostile to the interests of the other parts of the Empire.<sup>1</sup> If, therefore, a preference were sought by or offered to a dominion in respect of any article in which a foreign country competed seriously with other portions of the Empire, the British government would feel it to be a duty to use every effort to obtain an extension of the concession to the rest of the Empire. But the understanding to afford all parts of the Empire the benefit of favoured-nation treatment has been carefully observed by the dominions in commercial negotiations affecting the trade of the dominions. All concessions made to foreign powers have always been extended to all parts of the Empire.<sup>2</sup>

Regarding the form and signature of treaties the Inter-Imperial Relations Report, 1926, stated

'Some treaties begin with a list of the contracting countries and not with a list of heads of states. In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire" with an enumeration of the Dominions and India if parties to the Convention, but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire". This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.

'As a means of overcoming this difficulty it is recommended that all treaties (other than agreements between governments) whether negotiated under the auspices of the League or not should be made in the name of heads of states, and if the treaty is signed on behalf of any or all of the governments of the Empire, the treaty should be made in the name of the King as the symbol of the special relationship between the different parts of the Empire. The British units on behalf of which the treaty is signed should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire

<sup>1</sup> See *Parliamentary Papers*, 1910, house of commons, 129.

<sup>2</sup> e.g. the Union of South Africa-German Treaty, 1923, article 9; see note A at the end of this chapter.

which are not separate members of the League, Canada, Australia, Newfoundland, New Zealand, South Africa, Irish Free State, India. A specimen form of treaty as recommended is attached as an appendix to the Committee's report.

'In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part. The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating inter se the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connexion it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the legal committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions.

'In the case of some international agreements the governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which, and the terms on which, such provisions are to apply. Where international agreements are to be applied between the different parts of the Empire, the form of a treaty between heads of states should be avoided.

'The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the position of the British subjects belonging to those parts will be affected, for such government to advise the issue of full powers on their behalf to the plenipotentiary appointed to act on behalf of the government or governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

'In the cases where the names of countries are appended to the signatures in a treaty, the different parts of the Empire should be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty. The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above.

'The signature of a treaty on behalf of a part of the Empire should cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of the signature.<sup>1</sup>

Because legally the crown has the absolute power of concluding treaties, and has in the past always been advised by the British government, there has been no case known in which any

<sup>1</sup> *Inter-Imperial Relations Report, 1926*, part v (a). For the specimen form of treaty referred to, see note C at the end of this chapter.

treaty proper has been made without the consent of the British government. Treaties made by the crown were binding upon colonies whether such treaties were ratified by the colonial parliaments or not. Prior to 1882 all treaties concluded by the crown, *ipso facto*, applied to the colonies, unless they were specially excluded. In 1882 a treaty was entered into between the United Kingdom and a country hardly as large as an insignificant South African magisterial district, which contained the first 'colonial clause', a clause permitting the self-governing colonies to adhere to the treaty within a fixed period.<sup>1</sup> The right of separate withdrawal from a treaty on the part of a colony first appeared in 1889. The separate adherence to and withdrawal from treaties were at first considered possible only where a differentiation of treatment could be based upon a differentiation of locality. The practice of consulting the colonies was not introduced in political treaties of general or world-wide application; nor, indeed, had the colonies put forward any formal claim, up to the time of the Great War, to be given an option as to adherence in the case of general political treaties. Yet where dominion interests were directly affected in a regional treaty, it had become a fixed rule that the dominion government concerned should be consulted. In the General Arbitration Treaties with the United States in 1908 and 1911 the United Kingdom expressly reserved the right to obtain the concurrence of any dominion whose interests were directly affected by the treaty before any issue affecting it was submitted to arbitration.

Ratification of a treaty, in the absence of special agreement, is concluded by representatives accredited for the purpose. Ratification may be withheld for various reasons, as when the constitution of a state requires a treaty concluded by plenipotentiaries to be sanctioned by an elected or appointed body, such as the senate in the United States. In such cases it is an implied condition of negotiation that an absolute right of rejecting a treaty is reserved to the body the sanction of which is needed. It is now the practice in South Africa to make an express reservation of the right of ratification either in the full powers given to the negotiators or in the treaty itself.<sup>2</sup> Ratifica-

<sup>1</sup> Treaty with Montenegro, 1882.

<sup>2</sup> See, for example, the South Africa-German Treaty, 1928, in note A at the end of this chapter.

tions are signed by the person invested with the supreme treaty-making power (the King in the case of the Britannic states). Article 18 of the Covenant of the League of Nations provides that every treaty or international engagement entered into by any member of the League shall forthwith be registered with the secretariat of the League, and shall, as soon as possible, be published by it. No such treaty or international agreement is binding until so registered. But in other cases, as soon as ratification is completed, the treaty comes into definite operation.

In the case of the dominions, most treaties come into effect on the passing of legislation by the Dominion parliaments concerned. For example, in 1857, France concluded a treaty with the United Kingdom regarding French fishery rights in Newfoundland. The Newfoundland parliament declined to pass legislation approving the treaty, and it therefore never came into force.

The Imperial Conference of 1923 laid down certain rules for the ratification of treaties which still hold good:

- (a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part.
- (b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the governments of those parts of the Empire concerned. It is for each government to decide whether parliamentary approval or legislation is required before despatch for or concurrence in ratification is intimated by that government.

Parliamentary approval may be signified by resolutions of both houses of parliament, or by a resolution of the elected house only.<sup>1</sup> Many treaties require legislation to render them effectual; e.g. a commercial treaty involving tariff concessions would usually require an act of parliament to bring the tariff concessions into effect.

The Inter-Imperial Relations Report, 1926, contains the following provision regarding the coming into force of multi-lateral treaties:

'In general, treaties contain a ratification clause and a provision that the treaty will come into force on the deposit of a certain number of ratifications. The question has sometimes arisen in connexion with treaties negotiated under the auspices of the League whether for the purpose of making up the number of ratifications necessary to bring the treaty into force, ratifications on behalf of different parts of the Empire which are separate members of the League should be counted

<sup>1</sup> Cf. note B at the end of this chapter.

as separate ratifications. In order to avoid any difficulty in future, it is recommended that when it is thought necessary that a treaty should contain a clause of this character, it should take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate members of the League. We think that some convenient opportunity should be taken of explaining to the other members of the League the change which it is desired to make in the form of treaties and the reasons for which they are desired. We would also recommend that the various governments of the Empire should make it an instruction to their representatives at international conferences to be held in future that they should use their best endeavours to secure that effect is given to the recommendations contained in the foregoing paragraphs.<sup>1</sup>

It had been contended by General Smuts that at the Peace Conference and the Washington Conference the dominions were represented by distinct delegations. Sir John Salmond contended that there was but a single Empire delegation, and the Inter-Imperial Relations Report of 1926 seems to confirm this view.<sup>2</sup>

After the Great War the controversy over Chanak arose. When the question was raised by the British government of preventing by force the Turks from crossing into Europe, the prime minister of Canada replied that the Canadian parliament must determine whether that country should take an active part in a war in which the United Kingdom was involved. Later, when the Treaty of Lausanne was concluded with Turkey, the King having signed for the whole Empire, the Canadian government recognized that it was bound by the treaty but declared that it was a bilateral treaty imposing active obligations on one part of the Empire only. In 1923 Canada claimed that her representative alone should sign the treaty between herself and the United States regulating the halibut fisheries on the North Pacific coast. The treaty was negotiated on behalf of Canada by her representative, acting, with the full approval of the British government, through the British ambassador at Washington, and was signed by the Canadian representative alone under full powers issued in the usual manner by the King on the advice of the British government.<sup>3</sup>

<sup>1</sup> *Inter-Imperial Relations Report, 1926*, part v (a).

<sup>2</sup> See *The Times*, July 18, 1921. On August 10, 1934, General Smuts stated that the South African plenipotentiaries were appointed by the King in his government of the Union, and that the appointment was countersigned by the Prime Minister of the Union—*Rand Daily Mail*, August 11, 1934.

<sup>3</sup> See *Foreign Affairs*, vol. v, pp. 382 ff. for a full discussion; and Keith, *Responsible Government in the Dominions*, 2nd ed., p. 905.

This practice of signing a treaty by the dominion representative alone under powers issued on the advice of the King's British ministers was followed in 1924 in the commercial treaty negotiated between Canada and Belgium.

Once separate diplomatic representation was conceded to one dominion it naturally had to be conceded to all the other dominions. The British government showed great hesitation in allowing a dominion to sign a treaty alone, even though the powers for signing such treaty were given on the advice of the British ministry; but its attitude with regard to the appointment of ministers to foreign courts was different. In his statement regarding the appointment of a Canadian minister at Washington Mr. Bonar Law stated: 'It has been agreed that His Majesty, on the advice of his Canadian ministers, shall appoint a minister-pleni-potentiary who shall take charge of Canadian affairs at Washington.' The sole responsibility for such an appointment rested with the Canadian government. It is true that in that instance the Canadian secretary of state did not personally advise the King, but had he been in England at the time there is no doubt that he would have done so. As it happened the advice to the King was by order-in-council cabled to the secretary of state for the colonies, who acted and advised the King purely as the representative in this matter of the Canadian government. In 1924 the Irish Free State appointed a minister to the United States.

Negotiations between the United States and Canada are now conducted directly with the Canadian representative, who informs the British ambassador in accordance with well-established convention so that the latter may decide whether the matter of negotiation interests other parts of the Empire. If another part of the Empire is involved, such part may leave it to the Canadian representative to protect its interests or to the British ambassador or it may negotiate directly by its own representative. The most cordial interchange of views and information exists between the British ambassador at Washington and the dominion representatives.

## 7. Representation at International Conferences

In connexion with representation at international conferences, the Inter-Imperial Relations Report of 1926 stated:

'We also studied in the light of the resolutions of the Imperial Conference of 1923, to which reference has already been made, the question of the representation of the different parts of the Empire at international conferences. The conclusions which we reached may be summarized as follows:

'1. No difficulty arises as regards representation at conferences convened by or under the auspices of the League of Nations. In the case of such conferences all members of the League are invited, and if they attend are represented separately by separate delegations. Co-operation is ensured by the application of paragraph 1 (1) (c) of the Treaty Resolution of 1923.

'2. As regards international conferences summoned by foreign governments, no rule of universal application can be laid down, since the nature of the representation must, in part, depend on the form of invitation issued by the convening government.

- (a) In conferences of a technical character, it is usual and always desirable that the different parts of the Empire should (if they wish to participate) be represented separately by separate delegations, and where necessary, efforts should be made to secure invitations which will render such representation possible.
- (b) Conferences of a political character called by a foreign government must be considered on the special circumstances of each individual case.

'It is for each part of the Empire to decide whether its particular interests are so involved, especially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to leave the negotiation in the hands of the part or parts of the Empire more directly concerned, and to accept the result.

'If a government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other governments of the Empire in the light of the invitation which has been received.

'Where more than one part of the Empire desires to be represented, three methods of representation are possible:

- (i) By means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating.
- (ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the Conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.
- (iii) By separate delegations representing each part of the Empire participating in the Conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening government will make this method of representation possible.

'Certain non-technical treaties should, from their nature, be concluded



in a form which will render them binding upon all parts of the Empire, and for this purpose should be ratified with the concurrence of all the governments. It is for each government to decide what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as, for instance, by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the governments.<sup>1</sup>

In this division of the subject it has been necessary to confine our attention to general principles and to common conventions which carry with them some kind of formal agreement within the British Commonwealth. These principles and conventions command respect in the Union of South Africa where, however, occasions have not arisen to provide numerous illustrations of their workings. There is, however, no reason to believe that they cannot be applied without friction and with the generous co-operation of the Union. They imply a spirit of co-operation which need never be wanting if goodwill and statesmanship are forthcoming in the future as in the past.

### 8. A Commonwealth Tribunal for the Solution of Inter-Commonwealth Disputes

The Imperial Conference Report, 1930, dealt with this matter in the following manner:

'The Report of the Conference on the Operation of Dominion Legislation contains the following paragraph (paragraph 125):

"We felt that our work would not be complete unless we gave some consideration to the question of the establishment of a tribunal as a means of determining differences and disputes between members of the British Commonwealth. We were impressed with the advantages which might accrue from the establishment of such a tribunal. It was clearly impossible in the time at our disposal to do more than collate various suggestions with regard first to the constitution of such a tribunal, and secondly, to the jurisdiction which it might exercise. With regard to the former, the prevailing view was that any such tribunal should take the form of an *ad hoc* body selected from standing panels nominated by the several members of the British Commonwealth. With regard to the latter, there was general agreement that the jurisdiction should be limited to justiciable issues arising between governments. We recommend that the whole subject should be further examined by all the governments."

"This matter was examined by the Conference and they found themselves able to make certain definite recommendations with regard to it.

<sup>1</sup> *Inter-Imperial Relations Report, 1926*, part v (b).

'Some machinery for the solution of disputes which may arise between the members of the British Commonwealth is desirable. Different methods for providing this machinery were explored and it was agreed, in order to avoid too much rigidity, not to recommend the constitution of a permanent court, but to seek a solution along the line of *ad hoc* arbitration proceedings. The Conference thought that this method might be more fruitful than any other in securing the confidence of the Commonwealth.

'The next question considered was whether arbitration proceedings should be voluntary or obligatory, in the sense that one party would be under obligation to submit thereto if the other party wished it. In the absence of general consent to an obligatory system it was decided to recommend the adoption of a voluntary system.

'It was agreed that it was advisable to go further, and to make recommendations as to the competence and the composition of an arbitral tribunal, in order to facilitate resort to it, by providing for machinery whereby a tribunal could, in any given case, be brought into existence.

'As to the competence of the tribunal, no doubt was entertained that this should be limited to differences between governments. The Conference was also of opinion that the differences should only be such as are justiciable.

'As to the composition of the tribunal it was agreed:

- (1) The Tribunal shall be constituted *ad hoc* in the case of each dispute to be settled.
- (2) There shall be five members, one being the Chairman; neither the Chairman nor the members of the Tribunal shall be drawn from outside the British Commonwealth of Nations.
- (3) The members, other than the Chairman, shall be selected as follows:
  - (a) One by each party to the dispute from States Members of the Commonwealth other than the parties to the dispute, being persons who hold or have held high judicial office or are distinguished jurists and whose names will carry weight throughout the Commonwealth.
  - (b) One by each party to the dispute from any part of the Commonwealth, with complete freedom of choice.
- (4) The members so chosen by each party shall select another person as Chairman of the Tribunal as to whom they shall have complete freedom of choice.
- (5) If the parties to the dispute so desire, the Tribunal shall be assisted by the admission as assessors of persons with special knowledge and experience in regard to the case to be brought before the Tribunal.

'It was thought that the expenses of the tribunal itself in any given case should be borne equally by the parties, but that each party should bear the expense of presenting its own case.

'It was felt that details as to which agreement might be necessary might be left for arrangement by the governments concerned.'

It is difficult to arrive at any definite opinion on these recommendations in the Union of South Africa, as there has been little if any discussion of the proposals. It would seem, however, that they do not create anything like a judicial procedure. Doubtless, as far as one can learn, they were the product of compromises. It is, however, suggested that they do not represent any real solution of the problem concerned. Without going into detail, it is obvious that an *ad hoc* tribunal is least likely to establish rules of law, because it partakes too much of a system of arbitration in which the chairman perhaps alone brings to the issues involved anything like a judicial mind. We can only speak theoretically with no experience to guide us; but the recommendations as a whole do not inspire confidence. They certainly do not envisage a court and judicial methods as these are commonly conceived. If that be so, they are of little import, as naturally in any inter-commonwealth dispute arbitration would be sought. The problem yet remains as to the real judicial solution of such disputes, governed by judicial methods, obligation to proceed, and respect for the court. If it is to remain the rule that inter-commonwealth disputes are not to go to the Permanent Court of International Justice, then it would seem that ordinary arbitration must govern them, as there seems at present little likelihood that an inter-commonwealth court will emerge for such purposes.<sup>1</sup>

## NOTE A

*Formal Portions of Treaty of Commerce and Navigation  
between the Union of South Africa and the German Reich*

His Majesty the King of the United Kingdom of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, for and on behalf of the Union of South Africa, and the President of the German Reich, being desirous of further facilitating and extending the commercial relations already existing between the Union of South Africa and the German Reich, have resolved to conclude a treaty of commerce and navigation for that purpose and to that end, and have appointed their plenipotentiaries, that is to say:

His Majesty the King of the United Kingdom of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India:

<sup>1</sup> Compare, however, on this subject, *British Commonwealth Relations: Proceedings of the first unofficial conference at Toronto, 11-21 September, 1933*, (Ed. Toynbee, Oxford, 1934).

The Honourable Frederick William Beyers, K.C., M.L.A., a Member of the Executive Council and Minister of Mines and Industries for the Union of South Africa;

The President of the German Reich: Herr Otto Sarnow, Ministerialrat in the German Ministry of Finance;

Who, having satisfied themselves as to their respective full powers, have agreed as follows:

#### Article 26

The present treaty, after having been approved by the competent legislative authorities of the contracting parties, shall be ratified and the ratifications shall be exchanged in Berlin as soon as possible. It shall come into force on the day of the exchange of ratifications and shall be binding for two years from that date. This treaty shall thereafter remain in force until the expiration of six months from the date on which either of the contracting parties shall have denounced it.

In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereto their seals.

Done at Pretoria in duplicate in English, Afrikaans, and German texts, the 1st of September, 1928.

(Signed) F. W. BEYERS.

(Signed) O. SARNOW.

#### NOTE B

##### BILL

To provide for the approval by both Houses of Parliament of treaties and international agreements.

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and House of Assembly of the Union of South Africa, as follows:

##### *Approval of both Houses of Parliament required in respect of treaties and international agreements*

1. (1) No treaty or international agreement, entered into between the Union and any other State, shall be ratified unless both Houses of Parliament have, by resolution, approved of the same.

(2) (a) If the House of Assembly passes a resolution approving of any treaty or international agreement and if the Senate rejects or fails to pass it and if the House of Assembly in the next session again passes such resolution and the Senate rejects or fails to pass it, the Governor-General may during that session convene a joint sitting of the members of the Senate and the House of Assembly: Provided, that if the Senate shall reject or fail to pass any treaty or international agreement dealing with the taxation of the Union, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such treaty or international agreement.

(b) If the resolution is passed by a majority of the members present

at such joint sitting it shall be taken to have been duly passed by both Houses of Parliament.

*Short title*

2. This Act may be cited as the Treaties Act, 1930.

The bill was not proceeded with, as the government of the day were of opinion that it was sufficient approval of a treaty if the house of assembly only passed a resolution approving of it.

NOTE C

*Specimen form of Treaty approved by Inter-Imperial  
Relations Report, 1926*

The President of the United States of America, His Majesty the King of the Belgians, His Majesty the King (*here insert His Majesty's full title*), His Majesty the King of Bulgaria, &c., &c.,

Desiring . . .

Have resolved to conclude a treaty for that purpose and to that end have appointed as their Plenipotentiaries:

His Majesty the King (*title as above*):

for Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League (of Nations),	AB.
for the Dominion of Canada,	CD.
for the Commonwealth of Australia,	EF.
for the Dominion of New Zealand,	GH.
for the Union of South Africa,	IJ.
for the Irish Free State,	KL.
for India,	MN.

who, having communicated their full powers, found in good and due form, have agreed as follows:

In faith whereof the above-named Plenipotentiaries have signed the present treaty.

AB . . . CD . . . EF . . . GH . . . IJ . . . KL . . . MN . . .

(or, if the territory for which each Plenipotentiary signs is to be specified:

(for Great Britain, &c.)	AB.
(for Canada)	CD.
(for Australia)	EF.
(for New Zealand)	GH.
(for South Africa)	IJ.
(for the Irish Free State)	KL.
(for India)	MN.

## XXIX

### THE MANDATED TERRITORY OF SOUTH-WEST AFRICA

#### 1. The Nature of the Mandate

WHEN the Great War came to an end it was not possible, on account of the prevailing public feeling and the many statements as to a peace of justice, to carry out an open policy of annexation as established by war-time arrangements. The mandatory system was thus invoked as a new contrivance for ordinary annexation.

With such a basis constituting mandates, a mandatory power must necessarily have complete sovereignty over a mandated territory. As far as legislation is concerned the relationship of South-West Africa to the Union is one of complete subordination.<sup>1</sup> The South African courts have held that in consequence of the intimate relations existing in law between the Union and South-West Africa by virtue of the mandate, a conviction in the high court of South-West Africa in respect of a matter which is also a crime in the Union, cannot be disregarded by the other South African courts, and such a conviction cannot be treated as a foreign judgment.<sup>2</sup> In 1919, the Union parliament gave the governor-general full power to make appointments, establish offices, and issue proclamations repealing, altering, or amending the laws in force in South-West Africa.<sup>3</sup> The territory of South-West Africa was thereby placed in the first stage of government, namely, under the complete control of an external power, and its form of government closely resembled that of crown colony government. In 1925, the territory was granted a constitution, which was a compromise between the constitution of the senate of the Union and of the provincial councils.<sup>4</sup> The members of the legislative assembly, consisting of six members appointed by the administrator and twelve directly chosen by the electorate,

<sup>1</sup> See the Union Nationality and Flags Act, 1927, which includes South-West Africa as a portion of the Union.

<sup>2</sup> *Cape Law Society v. van Aardt*, [1926] C.P.D. 312.

<sup>3</sup> Treaty of Peace and South-West Africa Mandate Act, No. 49 of 1919.

<sup>4</sup> South-West Africa Constitution Act, No. 42 of 1925.

must take the oath of allegiance to the King as holding, on behalf of the government of the Union, the mandate for the territory of South-West Africa.<sup>1</sup> The Union parliament retains its full power to make laws for the territory as an integral portion of the Union.<sup>2</sup> The appellate division of the supreme court of South Africa is the court of appeal from the high court of South-West Africa in the same circumstances and subject to the same conditions as it is the court of appeal from a provincial division of the supreme court of South Africa.<sup>3</sup> The Union considers itself the sovereign of the territory of South-West Africa, and looks on the territory itself as an integral portion of the Union.

By Article 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers—that is, in favour of the United States, the British Empire, France, Italy, and Japan—all rights and titles over her oversea possessions, in order that all necessary steps might be taken for their administration on a mandatory basis, the general principles of which were enumerated by Article 22 of the Covenant of the League of Nations.

Article 22 lays down certain principles applicable to territories inhabited by peoples not as yet able to stand by themselves, who have ceased to be under the sovereignty of the states which formerly governed them. Their well-being and development were to form a sacred trust of civilization. Practical effect is given to these principles by entrusting the tutelage of such peoples to advanced nations who are in a position to undertake the responsibility; such tutelage to be exercised by them as mandatories on behalf of the League. 'There are territories', Article 22 provides, 'such as South-West Africa . . . which, owing to the sparseness of their population . . . or their geographical contiguity to the territory of the mandatory and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned.' The safeguards referred to relate to the prohibition of the slave trade, the traffic in arms and liquor, and the training of natives for other than defensive and public purposes. The degree of authority, control, or ad-

<sup>1</sup> South-West Africa Constitution Act, No. 42 of 1925, section 20.

<sup>2</sup> Ibid., section 44 and Act No. 49 of 1919.

<sup>3</sup> Section 3 of Act No. 12 of 1920. See *Rea v. Offen*, A.D., September, 1934.

ministration to be exercised by the mandatory is to be defined by the council, and the mandatory is to make an annual report to the council 'in reference to the territory committed to its charge', which report is to be examined by a permanent commission constituted to advise the council on all matters relating to the observance of the mandate.

The mandate for South-West Africa is as follows:

# THE MANDATE FOR SOUTH-WEST AFRICA

The Council of the League of Nations,

WHEREAS by Article 119 of the Treaty of Peace with Germany, signed at Versailles on 28th June, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

WHEREAS the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the Territory aforementioned and have proposed that the Mandate should be formulated in the following terms; and

WHEREAS His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory, and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

WHEREAS, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control, or administration to be exercised by the Mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations,

Confirming the said Mandate, defines its terms as follows:

## Article 1

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

## Article 2

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral



well-being and the social progress of the inhabitants of the territory, subject to the present Mandate.

#### Article 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on 10th September, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

#### Article 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

#### Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any state, members of the League of Nations, to enter into, travel, and reside in the territory for the purpose of prosecuting their calling.

#### Article 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4, and 5.

#### Article 7

The consent of the Council of the League of Nations is required for any modifications of the terms of the present Mandate.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation of the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice, provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva, the 17th day of December, 1920.

The introduction of a system of mandates by the League of Nations is not quite a new notion. There is, for instance, the

case of the Belgian Congo ; and the practice of granting corporate bodies a charter, conferring on them authority to govern and administer certain territories in Asia, Africa, or elsewhere, is well known. There are, no doubt, important differences between protectorates and colonies, between both of these and a territory mandated by the Council of the League. But between all there is this essential agreement: the grant or charter to the corporate body, the commission to the governor, like the mandate, is but a written instrument conferring authority to execute powers of government and administration in the territory to which it relates ; and it carries with it and creates rights and obligations.

When, by the Treaty of Versailles, Germany renounced all right to the territory known as South-West Africa, German sovereignty disappeared from that territory. Some other sovereignty must have replaced the German sovereignty. This sovereignty could be only the allied and associated powers of the treaty of Versailles, or the League of Nations, or the Union of South Africa.

The allied and associated powers do not constitute a state or a sovereign power. They are merely certain sovereign states which have mutually agreed to recognize certain political conditions created by the Treaty of Versailles.

Nor is the League of Nations a state ; but it nevertheless has a *persona* and rights and duties. Whether these rights include allegiance and the right of sovereignty need not be considered, because, so far as the government of the mandated territory of South-West Africa is concerned, the League can neither prescribe nor dictate to the mandatory in regard to the framing, making, and repealing of the laws which are to apply to the territory. It cannot give directions to the mandatory in respect of the establishment of judicial tribunals and the administration of justice, nor in respect of the appointment of officials, the raising and spending of revenue, and the like. Subject therefore, to the restrictions imposed, the mandatory has full right and power over the mandated territory.

The term 'mandatory power' may seem to imply that the mandatory acts as the agent of the allied and associated powers or of the League of Nations ; but neither by the Treaty of Versailles nor by the mandate of the League of Nations has the Union of South Africa been appointed as a mere agent. The allied

well-being and the social progress of the inhabitants of the territory, subject to the present Mandate.

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The consent of the Council of the League of Nations is required for any modifications of the terms of the present Mandate.

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case of the Belgian Congo ; and the practice of granting corporate bodies a charter, conferring on them authority to govern and administer certain territories in Asia, Africa, or elsewhere, is well known. There are, no doubt, important differences between protectorates and colonies, between both of these and a territory mandated by the Council of the League. But between all there is this essential agreement : the grant or charter to the corporate body, the commission to the governor, like the mandate, is but a written instrument conferring authority to execute powers of government and administration in the territory to which it relates ; and it carries with it and creates rights and obligations.

When, by the Treaty of Versailles, Germany renounced all right to the territory known as South-West Africa, German sovereignty disappeared from that territory. Some other sovereignty must have replaced the German sovereignty. This sovereignty could be only the allied and associated powers of the treaty of Versailles, or the League of Nations, or the Union of South Africa.

The allied and associated powers do not constitute a state or a sovereign power. They are merely certain sovereign states which have mutually agreed to recognize certain political conditions created by the Treaty of Versailles.

Nor is the League of Nations a state ; but it nevertheless has a *persona* and rights and duties. Whether these rights include allegiance and the right of sovereignty need not be considered, because, so far as the government of the mandated territory of South-West Africa is concerned, the League can neither prescribe nor dictate to the mandatory in regard to the framing, making, and repealing of the laws which are to apply to the territory. It cannot give directions to the mandatory in respect of the establishment of judicial tribunals and the administration of justice, nor in respect of the appointment of officials, the raising and spending of revenue, and the like. Subject therefore, to the restrictions imposed, the mandatory has full right and power over the mandated territory.

The term 'mandatory power' may seem to imply that the mandatory acts as the agent of the allied and associated powers or of the League of Nations ; but neither by the Treaty of Versailles nor by the mandate of the League of Nations has the Union of South Africa been appointed as a mere agent. The allied

and associated powers, through the League of Nations, have, by treaty between themselves, entrusted the complete government of South-West Africa to His Britannic Majesty through the Union of South Africa. The Union of South Africa determines by what laws South-West Africa is to be governed and how these laws are to be enforced. Once having elected to hand over South-West Africa to the Union, the League of Nations has no power to dictate how that territory is to be governed. The fact that the mandatory is required to report to the League what its political actions are in the mandated territory, makes no difference. It is a treaty obligation, which does not negative the Union's rights and powers. The full power of legislation and administration over the territory is therefore vested in the Union of South Africa and there is no other power which can enforce law there. Even the United Kingdom stands in the same relation to the Union in this matter as any other power, for she was one of the powers that agreed that the Union shall be the mandatory power. The Union, therefore, has sovereign power over the territory, and it has power to make laws and enforce them over the whole sphere of government.<sup>1</sup> This is the official view taken by the government of the Union, though it recognizes that it must administer the territory in the spirit in which the mandate was granted and endeavour by its administration to retain the confidence of the Council of the League of Nations.

The administration of the mandate is a function of the Union prime minister's department, and all official communications between the Union and South-West Africa go through that department to the administrator.

## 2. The Constitution of South-West Africa

(1) *Nature of the Constitution.* Under Union Act No. 49 of 1919, the exercise of the mandate was vested in the governor-

<sup>1</sup> *Rex v. Christian*, [1924] A.D. 101. The view stated in the text is not taken by E. van Maanen Helmer in *The Mandates System* (London, 1920), Chapter iii, but that author ignores *Christian's Case* on which the text is based, and on that case also does the Union government take its stand regarding the question of sovereignty over the mandated territory. See also N. Bentwich, *The Mandates System* (London, 1930), p. 120; Gey van Pittius, *Nationality within the British Commonwealth of Nations* (London, 1930), pp. 180 ff. The Union, however, has modified its claim in some degree to meet League criticism. See Keith's *Constitutional Law of the British Dominions*, pp. 370 ff., 452 ff. See *Rex v. Offen*, A.D. September, 1934.

general of the Union, who, by Union Proclamation No. 1 of 1921, delegated his powers to the administrator appointed by the Union government. In 1925, by Act No. 42 of the Union parliament, a constitution was granted to South-West Africa. Under this constitution the territory received an executive committee similar to the executive committee of a province of the Union, an advisory council, consisting of the administrator, the four members of the executive committee (who are elected by the legislative assembly) and three appointed members, and a legislative assembly, one-third of the members of which is appointed by the administrator.

It must be carefully noted that the constitution does not provide a two-chamber legislature. The advisory council is not a legislative body; it merely advises the administrator, and has no executive functions or powers. The legislature is the legislative assembly and the administrator.

Where the assembly differs from the provincial councils of the Union is that the latter have been granted specific and positive powers, whereas the assembly of South-West Africa has been granted power to make laws for the territory 'subject to the restrictions, reservations and exceptions contained in this Act'. The restrictions are to be found in sections 26 and 27 of the act, and are dealt with hereafter. The Union parliament has full power of legislation over South-West Africa, and subject to the enactments of the Union parliament, the governor-general has the power of legislating for the territory by proclamation, and, in that manner, may override and nullify all the legislation of the territory's legislative assembly and administrator.<sup>1</sup>

(2)<sup>2</sup> *Executive Committee.* This body consists of five members, one of whom is the administrator (who, also, is chairman). The remaining four persons are to be chosen by the assembly from among its own members or otherwise at its first meeting after any general election. The election of members, whenever such an election is contested, is held according to the principle of proportional representation, each voter having one transferable vote. All members other than the administrator hold office for

<sup>1</sup> Act No. 49 of 1919; section 44 of Act No. 42 of 1925.

<sup>2</sup> The rest of this chapter is based on the South-West Africa Constitution Act, No. 42 of 1925, and Chapter XXVII of the *Official Year Book of the Union*.

the duration of the assembly and until their successors are chosen. The administrator in executive committee carries on the administration of those matters in respect of which it is competent for the assembly to make ordinances. All matters are determined by a majority of votes of the members present, and in case of equality the administrator has a casting vote. Three members of the committee (of whom the administrator or the person appointed by the governor-general to act as administrator or to be the deputy-administrator is one) constitute a quorum at any meeting of the committee. The remuneration of the members of the committee, other than the administrator, is determined by the governor-general-in-council. The Constitution Act, as amended by Act No. 38 of 1931, provides for the vacation of their seats by ordinary members of the executive. If a member ceases to be qualified for election to the assembly, or resigns, or if, being a member of the assembly when chosen for the executive committee, he vacates his seat in the assembly, or if he is absent from four consecutive meetings of the executive without the administrator's consent, or if he vacates his seat on the advisory council, he ceases to be a member of the executive.

(3) *Advisory Council.* This body consists of eight members, namely, the administrator (who is chairman), the other members of the executive committee, and three members appointed by the administrator, subject to the approval of the governor-general. One member so appointed by the administrator must be an official selected mainly on the ground of his thorough acquaintance, by reason of his official experience or otherwise, with the reasonable wants and wishes of the non-European races in the territory.<sup>1</sup>

The council meets at such times and places as may from time to time be determined by the administrator, and four members form a quorum. The duties and functions of the council are to advise the administrator in regard to: (a) those matters in respect of which the assembly is not competent to make ordinances, including matters of general policy and administration apart from routine matters of administration; (b) his assent to an ordinance passed by the assembly or its reservation for the signification of the pleasure of the governor-general; and (c) any

<sup>1</sup> Cf. section 24 of the South Africa Act.

other matter upon which its advice may be requested by the administrator. Members of the council hold their seats thereon for the duration of the assembly, and continue to hold their seats, until after a general election of the assembly a new council can be constituted. Every member of the council, except the administrator, receives such remuneration as the governor-general prescribes.

(4) *Legislative Assembly.* The assembly consists of eighteen members, twelve of whom are elected by the voters of the territory and six appointed by the administrator, subject to the approval of the governor-general. The duration of the assembly is three years from the date of its first meeting after each general election.

Any person who is for the time being enrolled as a voter and who is not subject to the disqualifications prescribed by the act, is eligible for election or for appointment as a nominated member. A person is disqualified who: (a) has at any time been convicted of a crime or offence for which he has been sentenced to death or to imprisonment without the option of a fine, unless he has received a grant of amnesty or a free pardon, or unless the imprisonment has expired at least five years before the date of nomination or election; (b) is an unrehabilitated insolvent; (c) has been declared by a competent court to be of unsound mind; (d) holds any office of profit under the administration of the territory or of the government of the Union; (e) ceases for any other reason to be qualified to be enrolled as a voter.

There must be a session of the assembly at Windhoek at least once in every financial year, the interval between the last sitting in one session and the first sitting in the next session being not more than twelve months. Every member of the assembly must take an oath or make an affirmation of allegiance. The assembly must choose a chairman who has no deliberative vote, but only a casting vote in the event of equality of votes, on any question to be determined by the assembly. The administrator or any member of the executive committee who is not a member of the assembly has a right to take part in the proceedings of the assembly, but may not vote. The presence of nine members of the assembly is necessary to constitute the sitting thereof. The official languages are English and Dutch including Afrikaans, but any member may address the assembly in the German language.



The remuneration of members of the assembly is fixed by the governor-general-in-council.

(5) *Reservation of Legislative Powers.* The assembly has power to legislate by ordinance upon all matters except those which have been expressly reserved. The reservations are contained in sections 26, 27, and 28 of the act. These sections are important enough to be given *verbatim*:

26. Except with the consent of the Governor-General previously obtained on any particular occasion and communicated to the Assembly by message from the Administrator, it shall not be competent for the Assembly to make an ordinance in relation to any subject falling within the following classes of matters, that is to say—

- (a) native affairs or any matters especially affecting natives including the imposition of taxation upon the persons, land, habitations, or earnings of natives. Whenever any Ordinance of the Assembly imposes taxation upon the persons, lands, habitations, or incomes or earnings generally, natives and their lands, habitations, and earnings shall be exempt from its provisions;
- (b) mines, minerals, mineral oils, and precious stones or the moneys derivable therefrom, or payable to the Administration in respect of licences for prospecting or winning the same or as share of the produce thereof or any taxation in connexion therewith;
- (c) the acquisition, construction, management, regulation, control, and working of railways and harbours in the territory; and the organization, discipline, and conditions of employment of and the payment of pensions, retiring allowances, and financial benefits to persons in the employment of the Railways and Harbours Administration;
- (d) the organization of, and discipline and conditions of employment of persons in the public service who are serving in the Territory, and the payment of pensions, retiring allowances, and financial benefits to such persons;
- (e) the constitution and jurisdiction of courts of justice, whether superior or inferior, and the practice or procedure to be observed therein;
- (f) the administration, management, and working of the postal, telephone, and telegraph services;
- (g) the establishment or control of any military organization in the territory;
- (h) the movements or operations of any unit of the South African Defence Forces within the territory;
- (i) the entry of immigrants into the territory or of other persons;

- (j) tariffs of customs and excise duties and the control and management of customs and excise;
  - (k) currency and banking and the control of banking institutions.
27. (1) Except with the consent of the Governor-General previously obtained on any particular occasion and communicated to the Assembly by message from the Administrator, the Assembly shall not until the expiration of a period of at least three years from the date of the first sitting of the first session of the Assembly, be competent to make Ordinances in relation to any of the following subject-matters:
- (a) the establishment or control of any police force in the territory;
  - (b) civil aviation;
  - (c) primary or secondary education in schools supported or aided from the revenues of the territory;
  - (d) the establishment, management, or control of any land or agricultural bank in the territory;
  - (e) the allotment, sale, lease, or disposal of Government lands in the territory.
- (2) At any time after the expiry of the said period of three years, if power has not been so conferred by the Governor-General upon the Assembly to make Ordinances in relation to any particular subject-matter specified in sub-section (1), then the Governor-General may, on a recommendation made by the Assembly and embodied in a resolution for which it is certified by the Chairman thereof that not less than two-thirds of the members thereof voted, declare by proclamation in the *Gazette* and in the *Official Gazette* of the territory, the full competency of the Assembly to make Ordinances in respect of that subject-matter.
- (3) Save as is specially provided in this section, the provisions thereof shall remain in operation after the said period of three years.
28. It shall not be lawful for the Assembly—
- (a) to originate or pass any Ordinance, Vote, or Resolution which has the effect of appropriating any part of the Territory Revenue Fund formed as hereinafter provided; or
  - (b) to originate or pass any Vote, Ordinance, or Resolution imposing any tax, duty, due, or charge or burden on the people, unless such Ordinance, Vote, or Resolution has first been recommended to the Assembly by a written message of the Administrator during the session in which it is proposed.

Every ordinance passed by the assembly must be presented to the administrator for his assent. The administrator may then: (a) refer the ordinance back to the assembly, with such amendments as he may suggest for its consideration; (b) assent to

the ordinance ; or (c) reserve the ordinance for the signification of the governor-general's pleasure. In the last mentioned event the administrator must transmit the ordinance, together with such explanatory observations as may be necessary, to the governor-general, who may declare within six months after the receipt thereof by him, that he allows or disallows the ordinance or reserves it for further consideration. An ordinance so reserved has no force or effect unless and until the governor-general, within a further period of six months from the date of his reservation declares that he does not exercise his power of disallowance. Copies of all ordinances which have been reserved for further consideration by the governor-general or disallowed and the reasons for reservation or disallowance must be laid upon the tables of both houses of parliament. Unless a particular date is fixed, every ordinance comes into operation as from the date of its first publication in the *Gazette*.

Although not competent to make ordinances on the matters reserved by sections 26 and 27 of the act, the assembly may by resolution recommend to the governor-general or to the administrator the issue of a proclamation enacting a law or amending or repealing any law relating to such matters.

As regards finance, the act provides for the formation of a fund known as the Territory Revenue Fund, which may be drawn upon only under the authority of an appropriation ordinance passed by the assembly and in pursuance of a warrant under the hand of the administrator directed to an officer serving under the administration of the territory ; provided that until such appropriation has been made and for a period not exceeding two months after the end of a financial year, the administrator may withdraw from the fund moneys to meet expenditure on services, in respect of which there has been an appropriation up to the end of that financial year. The administrator may, by special warrant under his hand, authorize the issue of moneys from the Territory Revenue Fund : (a) to defray unforeseen expenditure of a special character, which is not provided for in any Appropriation Ordinance or in an Appropriation Proclamation issued under section thirty-eight of the act, as amended by Act No. 38 of 1931, and which cannot without serious injury to the public interest be postponed until adequate provision can be made therefor by the Assembly ; or (b) to meet

an excess on any head of expenditure in an Appropriation Ordinance or Appropriation Proclamation. The total sum which the administrator may authorize must not at any time exceed £25,000, and the relative expenditure must be submitted to the assembly for appropriation not later than its next ensuing session.

The annual estimates of expenditure for the territory are prepared by the administrator in consultation with the advisory council, and thereafter submitted to the assembly. The act provides that

38. If the Assembly rejects or fails to pass—

- (a) an Ordinance appropriating in any financial year money from the Territory Revenue Fund sufficient, in the opinion of the Administrator, to pay during that year the salaries and allowances of the Administrator, of the Judge of the High Court, and of officers serving under the Administration, and to carry on the public Administration of the Territory, and any other services which the Administrator certifies to be necessary in the interests of the Territory or to meet any liabilities which have been incurred in or in respect of the Territory or of any railway or harbour works therein; or
- (b) an Ordinance imposing any tax to raise in any year revenue which the Administrator certifies to be, with other revenues, necessary for the purposes described in paragraph (a);

or, though passing the Ordinance, passes it with amendments to which the Administrator personally is unable to agree, regard being had by him to the purposes aforesaid, the Administrator may transmit a full report in relation to the whole matter to the Governor-General, and the Governor-General may, after consideration of that report and of any further report or recommendation on the matter, passed and transmitted by the Assembly by message, make a law by proclamation under the powers reserved to the Governor-General under this Act, providing for such appropriation or such tax (as the case may be) as may, in the opinion of the Governor-General, be sufficient for the purposes mentioned in paragraph (a) or paragraph (b) of this section (as the case may be).

Section 44 of the act contains the following important reservation:

- 44. (1) Nothing in this Act contained shall be construed as in any manner abolishing, diminishing, or derogating from those full powers of administration and legislation over the Territory as an integral portion of the Union which are conferred by the mandate hereinbefore recited and have been confirmed by the

*Treaty of Peace and South-West Africa Mandate Act, 1919* (Act No. 49 of 1919), or as modifying any provision of that Act. Those full powers of administration and legislation are hereby expressly reserved to the Governor-General and may be exercised or delegated by him in accordance with that Act to the intent that by proclamations new laws may be made for the Territory, existing proclamations may be repealed, amended, or modified, or any Ordinance made by the Assembly and in force under this Act may be repealed, amended, or modified. Every such proclamation of the Governor-General or of the Administrator shall, before it has the force of law in the Territory, be published in the *Official Gazette* thereof.

(2) A Proclamation of the Administrator or an Ordinance made by the Assembly shall, though promulgated, have effect in and for the Territory so long and as far only as it is not repugnant to or inconsistent with a Proclamation of the Governor-General, or an Act of the Union Parliament, applicable to the Territory.

Section 45 of the act provides as follows:

45. After the expiration of a period of three years from the date of the first sitting of the first session of the Assembly, the Governor-General may, on a recommendation made by the Assembly and embodied in a resolution for which it is certified by the Chairman thereof that not less than two thirds of the members thereof voted, repeal, or alter any provision of this Act, except sections *twenty-six* and *forty-four* and this section; provided that the Governor-General shall not act upon such a recommendation, unless the proposals contained therein have lain upon the Tables of both Houses of Parliament for a period of one month and during that period neither House has expressed its disapproval of the proposals.

(6) *Franchise*. Every European male person who: (a) has been resident in the territory for twelve months prior to the date fixed for the commencement of any provisional list of voters; and (b) is twenty-one years of age or upwards at that date; and (c) is a British subject, as well as every male person who, under section 2 of Act No. 30 of 1924, became a British subject naturalized under Act No. 4 of 1910, shall be entitled to be registered as a voter, unless in either case he is disqualified for any reason mentioned in paragraph 2 of the schedule to the act. But no person shall be entitled to be registered on more than one list or, if registered on more than one list, to vote in more than one electoral division. No person shall be entitled to be registered if he has been (a) convicted at any time of murder unless he has obtained a free pardon therefore; (b) convicted at

any time of any offence and sentenced to imprisonment without the option of a fine, which imprisonment has not expired at least three years before the date of the commencement of registration, unless he has obtained a free pardon for that offence.

(7) *District Administration.* The territory, exclusive of Ovamboland, is divided into seventeen magisterial districts, wherein the various magistrates exercise certain administrative as well as judicial functions. They are charged with the functions of receivers of revenue, and, excepting in the districts of Windhoek and Luderitz, with the control of district native affairs.

(8) *Local Government.* Town and district councils were established in 1910 by a decree of the German imperial chancellor. The district councils lapsed on the occupation of the country by the Union forces, but the town councils were allowed to continue in office until the end of 1918, when their powers were taken away and exercised by the magistrates. In July 1920 a proclamation re-establishing municipal councils was issued. Under this proclamation councillors were nominated by the administrator for one year, and certain powers of intervention were reserved. In every case, half the number of councillors appointed were Germans. In other respects the proclamation follows Union lines, and a rating system is established in lieu of the municipal income tax, which formed the chief feature of municipal finance under the German régime. A municipal amendment proclamation was promulgated in 1922, providing for the election of half of the members of municipal councils. In January 1925, a proclamation (No. 2 of 1925) was issued, under which it is competent for the administrator to establish a village management board in any village not being a municipality, and in any other area of residence of any community. Such board, of which the magistrate of the district is *ex-officio* chairman and treasurer, consists of not fewer than two and not more than four members appointed by the administrator from amongst the residents in the area for which it is constituted, and possesses certain powers of local government defined by the proclamation.

(9) *Financial Organization.* The territory under the German government had not reached the independent stage of British self-governing colonies. The landesrath was merely an advisory body, and all fiscal edicts were issued by the governor. The estimates of revenue and expenditure prepared in the territory

required the sanction of the imperial reichstag. The supervision of the imperial government was held to be justified on the grounds that imperial grants were made annually to the protectorate, although these grants merely approximated to the cost of the military establishment. The imperial government guaranteed the loans issued for the purpose of building railways. The control of all revenue and expenditure, including that of the railways, but excluding post and telegraph revenue, was exercised by the 'finanz referent' under the governor. The post and telegraph department was a branch of the imperial department, and quite distinct from the protectorate administration. Certain revenues were assigned by the governor to municipal and district councils. These included dog tax, liquor, bar, hotel, and trade licences. The local authorities were also empowered to raise funds for local purposes by means of an income tax.

After the occupation by the Union forces, changes were made to bring the administration into line with that of the Union, but no fundamental changes were made in taxation laws. The administration was financed by grants from the Union war loan vote to March 1920. Since that date it has been financed from revenue raised in the territory. The railways were taken over, and financed by the railways and harbours department of the Union; but the German tariff of charges was retained. Union Act No. 20 of 1922 enacts that the government railways and harbours in the territory as they existed on January 11, 1920, should become from that date vested in the railway administration of the Union as part of the Union system. The loss arising from the working of the railways from August 1, 1915, to March 31, 1922, was made chargeable to the Union railways and harbours capital account, while future receipts and expenditure were to be charged to the Union railways and harbours fund. The territory was thus relieved of the burden of financing the railways and maintaining the high rates levied under the German régime. Considerable reductions have been made in the through passenger fares to the Union and in goods traffic rates. The municipal councils continued to exist, and the German practice of assigned revenues was followed by the Union administration. The district councils were abolished.

Generally the revenues payable under the German system have been collected and utilized in part payment of the cost of



administration. The customs revenues have been collected and retained in the Union; but from April 1, 1919, these were credited to the territory, and the Union treasury was authorized to exercise financial control over the territory.

The provisions of the Union Exchequer and Audit Act, 1911, were applied to South-West Africa from April 1, 1921. The financial regulations framed under the act were also applied as far as they could be made applicable, and financial regulations to meet local requirements were also issued. An ordinance to regulate the receipt, custody, and issue of public moneys and to provide for the audit of accounts thereof was passed by the legislative assembly for the territory at its first session and brought into operation in September, 1926.

(10) *Naturalization.* The South-West Africa Naturalization of Aliens Act, No. 30 of 1924, passed by the Union parliament, made the Naturalization of Aliens Act, No. 4 of 1910, effective in the territory, which for the purposes of the act was considered to form part of the Union. Act No. 30 of 1924 provided that every adult European, who, being a subject of any of the late enemy powers, was on January 1, 1924, or at any time thereafter or at the commencement of the act domiciled in the territory should at the expiration of six months after the latter date, be deemed to become a naturalized British subject unless within that period he signed a declaration that he was not desirous of being naturalized. The Naturalization of Aliens Act, No. 4 of 1910, was repealed by the British Nationality in the Union and Naturalization and Status of Aliens Act, No. 18 of 1926. The latter act is in force also in South-West Africa, the expression 'the Union' being defined by the act to include South-West Africa. In the same way, the Union Nationality and Flags Act, No. 40 of 1927, is in force in South-West Africa.<sup>1</sup>

### 3. The Administration of Justice

(1) *Legal System.* Article 2 of the mandate, under which the territory is administered by the government of the Union of South Africa, authorized the mandatory to apply the laws of the Union to the territory, subject to such local modifications as circumstances might require. By the Administration of Justice Proclamation, 1919, the Roman-Dutch Law as existing and

<sup>1</sup> This act also includes South-West Africa as part of the Union.



applied in the province of the Cape of Good Hope on January 1, 1920, was introduced as the common law of the territory, and all existing laws in conflict therewith were to the extent of such conflict repealed, except that proclamations issued during the military occupation and still in force continued to remain in force. Rights already accrued and liabilities already incurred were preserved. The effect of this proclamation was that Roman-Dutch law has been introduced into South-West Africa together with all the modifications which it had undergone in the Cape Province by desuetude, custom, judicial decision, and statute, whether abrogating or enacting. The statutory law of the Cape Province relating to the execution of wills is therefore the law of the territory, and the Cape law of prescription as contained in Act No. 6 of 1861 is also part of the law of the territory. Much of the statute law of the Union has been specifically extended to the territory by Union Act, proclamation, or ordinance, subject to amendments required by local circumstances. Amongst such statutes may be mentioned those relating to the interpretation of laws, solemnization of marriages, insolvency, administration of estates, deeds registration, companies, bills of exchange, stamp duties, profiteering, prisons, public health, rents, pounds, liquor licensing, inquests, concealment of birth, protection of girls and mentally defective women, prevention of cruelty to animals, stock theft, diseases of stock, vagrancy, masters and servants; police offences, preservation of game, railways and harbours, and usury. Certain portions of the German law (for example, that portion relating to mining) have been kept alive by express provisions in proclamations issued by the administrator. A few acts of parliament of the Union apply directly to the territory.<sup>1</sup>

The law in force in South-West Africa includes, therefore, (i) the Roman-Dutch Law, with the modifications which it has undergone in the Cape province as explained above; (ii) certain Union acts of parliament which apply directly to the territory; (iii) proclamations issued by the governor-general or the administrator, some of which specially introduce Union statutes; (iv) ordinances by the legislative assembly; (v) those portions of the German law which have been expressly preserved; and (vi)

<sup>1</sup> e.g. Acts Nos. 24 and 29 of 1922; No. 27 of 1923; No. 30 of 1924; No. 42 of 1925; Nos. 13, 18, and 22 of 1926; Nos. 22 and 40 of 1927; No. 27 of 1928.

those fragments of the German law which have survived by reason of the fact that they do not conflict with any of the laws already mentioned.

(2) *Superior Courts.* On January 1, 1920, military courts were abolished and civil courts established. A superior court entitled the High Court of South-West Africa was created, consisting of a single judge. It has its seat at Windhoek, but may be held at other places appointed by the judge. In civil cases the judge sits alone, but in criminal cases the court is composed of the judge, who is president, and two other members, who must be either advocates or magistrates. There is no jury. Questions of law are decided by the judge, except questions of law governing punishment, which are decided by a majority of the members of the court. Questions of fact are determined by a majority of members which also fixes the sentence to be passed. An officer styled the Attorney-General has been appointed, who, in regard to the prosecution of crimes and offences, possesses the powers of an attorney-general in a province of the Union under section 129 of the South Africa Act. There are also a registrar and master of the high court, a registrar of deeds, and a sheriff.

By Proclamation No. 38 of 1920, circuit courts were established with a constitution similar to that of the high court. The territory is divided from time to time into two or more circuit districts in each of which a circuit court is held at least twice a year.

An appeal from the high court or from a circuit court, whether in exercise of civil or criminal jurisdiction, lies to the appellate division of the supreme court of South Africa under the same circumstances and subject to the same conditions as an appeal lies from a provincial division of the supreme court of South Africa.<sup>1</sup> In cases of an appeal from orders or judgments of the high court or a circuit court upon application by way of motion or petition, or on summons for provisional sentence, or judgments as to costs only, or on civil or criminal appeals from a magistrate's court, special leave to appeal must first be obtained from the appellate division.

The law of procedure and evidence in the high court and in circuit courts in civil cases is that of the Cape provincial division

<sup>1</sup> Section 3 of Act No. 12 of 1920.

of the supreme court of South Africa, and in criminal cases that prescribed by the Union Criminal Procedure and Evidence Act, 1917, which has been extended and applied to the territory with certain amendments. Rules for the conduct of proceedings in the high court and circuit courts are framed by the judge of the high court subject to the approval of the administrator.

(3) *Inferior Courts.* Magistrates' courts were also established on January 1, 1920, and have the same jurisdiction and observe the same procedure as the magistrates' courts in the Union. An appeal lies to the high court of South-West Africa from a judgment of a magistrate's court in the same circumstances and on like terms and conditions as an appeal may be had to a provincial division of the supreme court of South Africa from a magistrate's court in the Union. All sentences imposed by a magistrate's court of whipping or of fines exceeding £5 or of imprisonment exceeding one month are reviewed by the high court. The country is divided into eighteen magisterial districts each of which is the area of jurisdiction of a magistrate's court. Periodical courts are also held by magistrates at other places at regular intervals. Any magistrate's court may be held at any place or places within the local limits within which it has jurisdiction, appointed by the magistrate. There is no Rules Board, as in the Union, but by Proclamation No. 1 of 1920, the judge of the high court has been empowered to frame new rules and to repeal and amend existing rules of magistrates' courts, subject to the approval of the administrator.

Special justices of the peace have been appointed under Proclamation No. 25 of 1921. They have jurisdiction in criminal cases to impose a sentence of a fine not exceeding £10, and imprisonment not exceeding one month. Except in the case of juvenile offenders, special justices of the peace may not impose a sentence of whipping. All sentences imposed by special justices of the peace are reviewed by the magistrates of the respective districts. Special justices of the peace have no jurisdiction in civil cases.

The power to remit sentences is vested in the administrator, except as regards death sentences, in which case the prerogative of mercy may be exercised by the governor-general-in-council of the Union. The languages which may be used in the courts

are English and Dutch including Afrikaans, but German may be used in addressing the high court. In criminal cases interpreters are provided in all languages free of charge, and in the high court interpreters in English, Dutch, and German are provided free in civil cases also.

By Act No. 24 of 1922 of the Union parliament provision was made for the reciprocal service and enforcement in the Union and the territory of civil and criminal summonses, orders, warrants, and other processes of magistrates' courts and superior courts. Provision was also made for the removal of proceedings, whether criminal or civil, from a superior court in the Union to the high court of South West-Africa, and vice versa. The same act provided that for all judicial purposes the port and settlement of Walvis Bay should be regarded as a part of the territory of South-West Africa. That port and settlement has been included in the magisterial district of Swakopmund.

By Act No. 13 of 1926 of the Union parliament, provision was made for the arrest and surrender of fugitive offenders from British colonies and protectorates in Africa south of the Equator, in which the governor-general by proclamation declares that there exists a law providing reciprocally for the arrest and surrender of fugitive offenders from South-West Africa. The same Act provided for the application to South-West Africa of the Imperial Extradition Acts, 1870 to 1906, as regards the extradition of fugitive criminals between South-West Africa and any foreign State between the government of which and His Majesty an extradition treaty has been entered into, if the treaty provides for its extension to South-West Africa. By Proclamation No. 26 of 1920, provision was made to enforce the attendance before the courts of inhabitants of certain adjoining territories resident or being within South-West Africa and required as witnesses in civil or criminal proceedings.

(4) *Admission of Legal Practitioners.* Provision has been made for the admission of advocates, attorneys, notaries public, and conveyancers. The high court may admit to practise as an advocate or as an attorney any person entitled to practise or to be admitted to practise as an advocate or as an attorney, as the case may be, in any division of the supreme court of South Africa. No person may be admitted to practise both as an advocate and as an attorney. Certain practitioners of the former

German courts of South-West Africa may also be admitted to practise as advocates or as attorneys. The high court may also admit as an attorney any person who, after having passed the matriculation examination of any university in the Union of South Africa or an equivalent examination, has served under articles for three years, and has passed the examination in law and jurisprudence of the university of the Cape of Good Hope or an equivalent examination of another South African university, and who has also passed an examination in practice by three examiners appointed by the court; a person so admitted may also appear in any proceedings before a magistrate's court. The high court exercises jurisdiction in respect of advocates, attorneys, notaries public, and conveyancers, similar to that exercised by the Cape provincial division of the supreme court in respect of practitioners in the Cape province. By Proclamation No. 32 of 1921, the Law Society of South-West Africa was established.

(5) *The Government of the Natives.* The main provisions of the native law, apart from those dealing with masters and servants, which is practically the law as it exists in the Cape Province, in areas which have been opened up for settlement for Europeans, are embodied in the following enactments:

(a) *The Native Administration Proclamation, 1922*, which supercedes many of the old German laws, and constitutes the principal pass law, regulating as it does the movements of natives within the territory and of those desirous of leaving or of entering it. This proclamation also provides for the exemption of natives under certain conditions from the carrying of passes, and contains provisions for the establishment of reserves and the control of natives therein and on farms. The pass laws are not applicable in purely native areas, such as Ovamboland and Rehoboth.

(b) *The Vagrancy Proclamation*, which provides for the suppression of idleness and trespass. Natives are allowed to select their own masters, and strict instructions have been issued against forcing natives to take service with particular masters against their will. When a native is dilatory in finding employment an employer can be indicated, and if he refuses to engage himself, he can be prosecuted under the vagrancy laws. Before sentencing natives under the vagrancy laws, magistrates are required to give the offender an opportunity of taking employ-

ment in preference to undergoing imprisonment. Certificates of exemption from labour may be granted to natives having visible means of support, such as possession of stock. Persons unfitted for labour for reasons of old age or infirmity are *ipso facto* exempted persons.

(c) *The Municipal Proclamation*, which empowers municipalities to make regulations, subject to government sanction, for the control and management of native locations within their respective areas.

(d) *The Natives' Stock Brands Proclamation*, which provides for the branding and registration of their large stock, frees natives from the liability of having to purchase branding irons. Under this proclamation these irons are provided by the administration and are in the custody of prescribed officials under whose supervision the stock is branded.

(e) *The Native Reserve Trust Fund Proclamation*, which provides for revenue collected in reserves being spent entirely in the interests of the natives resident in the reserves concerned.

(f) *The Urban Areas Proclamation*, which adopts all the main provisions of the Union Natives (Urban Areas) Act of 1923, and omits only those which are not applicable to the conditions obtaining in the territory.

(g) *The Native Administration Proclamation*, 1928, which provides for the appointment of a chief native commissioner, native commissioners, and assistant native commissioners, establishes courts for the hearing of native cases, and deals with tribal organization and the control of natives generally.

The natives are in a very backward state of development. Reserves have been established in various areas, and these are controlled by chiefs or headmen who are responsible to the magistrate of the district for the preservation of law and order. In some instances European superintendents have been appointed.

## THE SOUTH AFRICAN HIGH COMMISSION AND THE SOUTH AFRICAN CROWN TERRITORIES<sup>1</sup>

### 1. The South African High Commission

THE office of high commissioner in and for South Africa was created by letters patent in 1878. Under the commission of 1889, the high commissioner now represents the crown in all matters occurring in South Africa beyond the limits of the Union and of Southern and Northern Rhodesia.

Prior to October 1, 1923, Southern Rhodesia was administered by the British South Africa Company, and the high commissioner exercised certain powers of control under the Southern Rhodesia Order-in-Council, 1898. On September 12, 1923, the territory was annexed to His Majesty's dominions as the colony of Southern Rhodesia. On October 1, 1923, responsible government was established in the colony, and on that date the first governor of Southern Rhodesia assumed office. Upon the establishment of responsible government, the Order-in-Council of 1898 lapsed, but under the constitution letters patent, the high commissioner was vested with certain powers and functions in regard to native administration, and the Southern Rhodesia order-in-council, 1920, whereby the native reserves were vested in the high commissioner, was continued in full force and effect.

Communications from the Union government relating to the high commission territories go through the department of external affairs of the Union to the high commissioner for South Africa at Pretoria.

### 2. Basutoland

Basutoland was annexed to the Cape Colony in 1871, and in 1884 was disannexed and brought under the direct control of the British Government. The territory is now governed by a resident commissioner under the direction of the high commissioner for South Africa, the latter possessing the legislative authority, which is exercised by proclamation. The chiefs

<sup>1</sup> This chapter is based on the memoranda supplied by the office of the High Commissioner for South Africa at Pretoria.

adjudicate on cases between the natives, with a right of appeal to the magistrates' courts, where all cases between the natives and Europeans are brought. There is a Basutoland council consisting of a hundred members, all natives, ninety-five being nominated by the chiefs and five by the Government. The council is consultative and advisory, and deals chiefly with the domestic affairs of the people. It has no executive powers.

*Administration of Justice.* The Basutoland courts of law consist of:

(a) *The court of the resident commissioner*, which constitutes the supreme court of Basutoland, and from which an appeal lies to judicial committee of the Privy Council. Under Proclamation No. 10 of 1928, the constitution of the resident commissioner's court has been amended and provision has been made for the appointment of a judicial commissioner, who may sit with the resident commissioner or alone; and there may be associated with the court not more than two officers of the administration, appointed by the resident commissioner for the purpose by notice in the *Gazette*. The resident commissioner, when present, and in his absence the judicial commissioner, shall be president of the court, and the judgment of the court is the judgment pronounced and approved by the president.

The power conferred upon the resident commissioner to review and correct the proceedings of courts or officers may be exercised also by the judicial commissioner, and any decision recorded or action taken by the judicial commissioner in the course of such review or correction shall be of the same force and effect as if it had been recorded or taken by the resident commissioner.

(b) *Courts of assistant commissioners*, which are empowered to impose sentences not exceeding two years' imprisonment with hard labour, or fines not exceeding £50, with jurisdiction in civil cases up to £500.

These courts, however, have no jurisdiction to try summarily any person charged with treason, murder, attempt to murder, culpable homicide, rape, attempt to commit rape, or sedition; and in these cases and other serious crimes preparatory examinations are taken.

(c) *Two courts of officers-in-charge in sub-districts*, which have minor jurisdiction in criminal cases to impose a penalty not



exceeding six months' imprisonment or a fine of £10. All the proceedings of these courts are sent to the assistant commissioners' courts of their districts for confirmation.

(d) *Native courts.* Under Proclamation No. 26 of 1884, the paramount chief and other native chiefs of Basutoland were authorized to continue to exercise jurisdiction according to native law and custom in civil and criminal cases, within such limits as may be defined by any rules established by the authority of the resident commissioner, subject to a proviso that no suit, action, or proceeding whatsoever, to which any European shall be a party, either as plaintiff or complainant or as defendant, shall be adjudicated upon by any such chief, save by the consent of all parties concerned. An appeal lies from the decision of any chief to the court of the assistant commissioner of the district within which such chief holds his court; provided that in no case in which any European shall have agreed to submit himself to the jurisdiction of any such native chief as aforesaid shall he have the right of appeal from the judgment or decision of any such chief.

The laws in force are the same as were in force in the Cape of Good Hope up to March 18, 1884, except where repealed or altered by proclamation of the high commissioner, who is also empowered to make by proclamation such laws as may be necessary for the peace, order, and good government of the territory.

### 3. Bechuanaland Protectorate

During the year 1885 Sir Charles Warren, who was in command of an expedition dispatched from the United Kingdom to pacify Southern Bechuanaland, and the Boers from the South African Republic, visited the principal chiefs in the territory now known as the Bechuanaland Protectorate, and as a result a British protectorate was proclaimed over their territories. No further steps were taken until the year 1891, when, by an order-in-council, dated May 9, the limits of the Bechuanaland Protectorate were more clearly defined, and the high commissioner for South Africa was authorized to appoint such officers as might appear to him to be necessary to provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of

the territory. A resident commissioner was appointed and two assistant commissioners and the laws in force in the colony of the Cape of Good Hope on June 10, 1891, were declared in force in the territory *mutatis mutandis*, and so far as not inapplicable. Subsequent legislation has been effected by proclamation of the high commissioner.

The form of government is very similar to that which obtains in Basutoland. The territory is administered by a resident commissioner under the direction of the high commissioner for South Africa, the latter possessing the legislative authority, which is exercised by proclamation. There is also an assistant resident commissioner.

*Administration of Justice.* The resident commissioner exercises all the powers possessed by the supreme court of the Cape Colony in 1891, but no original civil action, suit, or proceeding can be instituted in his court, and, except in cases of murder, it is not competent to institute or bring any criminal proceedings before his court in the first instance, otherwise than by way of appeal from the decision of a court of assistant commissioner, resident magistrate, assistant resident magistrate, or special justice of the peace.

Until 1912 assistant commissioners and resident magistrates had jurisdiction in all civil and criminal cases except murder, subject to the right of appeal to the resident commissioner and to the Crown-in-Council; but their jurisdiction did not, and does not, except in native divorce cases where the parties have been legally married in accordance with European law, extend to any matter in which natives of the same tribe are concerned, unless in the opinion of such court the exercise of such jurisdiction is necessary in the interest of peace or for the prevention or punishment of acts of violence to persons or property. Until 1912, also, the trial of every person charged with murder had, under section 4 of the Bechuanaland Protectorate Proclamation, No. 2 of 1896, to be held before a court consisting of the resident commissioner, as president, and any two assistant commissioners or resident magistrates of the territory. But since 1912 a special court, called the special court of the Bechuanaland Protectorate, has been established for the trial of such cases (civil and criminal) as are hereinafter mentioned and (save as hereinafter otherwise stated) to exclude such cases from the jurisdiction of the courts

of resident commissioner, assistant commissioner, and resident magistrate. The special court is held at such time and at such place or places as are publicly notified by the resident commissioner, and consists of a judge or advocate of the supreme court of South Africa, appointed by the high commissioner to be president of the court, and any two assistant commissioners nominated by the resident commissioner.

Such court has jurisdiction in respect of:

(a) Civil actions in which either party is a European, and in which the claim or value of any property in dispute exceeds £1,000, or in which the action is for the divorce of persons joined in matrimony or for a declaration of nullity of marriage.

(b) Criminal cases in which the accused is a European and is charged on indictment with any of the following offences, or with an attempt to commit any such offence: Murder, culpable homicide, rape, perjury, arson, offences relating to the coinage or currency, and other offence with which such accused may be charged before a court of a resident magistrate and which that court may consider to be, from its nature or magnitude, subject to the jurisdiction of, or more proper for, the cognizance of the special court.

(c) Any case at any time pending in the court of the resident commissioner on appeal or in the court established under section 4 of Proclamation No. 2 of 1896 as amended by Proclamation No. 48 of 1920, which such courts may on their own motion remove to a special court.

(d) Such civil actions pending in any court of assistant commissioner or resident magistrate in which either party is a European as such court may, either on application to it by either party to the action or on its own motion, remove to the said special court.

(e) Any civil action in which natives only are concerned, which may any time be pending in any court of resident magistrate under the provisions of section 8 of the Proclamation of June 10, 1891, and which the court may, of its own motion, remove to the said special court by reason either of the magnitude of the issues involved or of considerations affecting the peace and good order of the Protectorate; and neither the court of the resident commissioner nor a court of assistant commissioner or resident magistrate now has jurisdiction in

any cases mentioned in (a) or (b) above, otherwise than for conducting a preliminary examination, unless both of the parties or the accused, as the case may be, apply to have the case tried before such court and such court grants such application where the case is within its jurisdiction. A right of appeal to the privy council lies against any final judgment, decree, sentence, or order of the said special court.

When the special court is not sitting, any court of assistant commissioner or resident magistrate may hear and determine (a) all motions and applications (including applications for arrests and interdicts of persons and things) in respect of any claim, debt, or matter in dispute which is within the jurisdiction of the said special court, whether an action in respect thereof is pending in the said special court or not; (b) all actions for provisional sentence which are within the jurisdiction of the said special court; (c) all trial cases commenced in the said special court in which either the plaintiff or the defendant is in default or in which consent to judgment is filed by the defendant; where such court would but for the provisions above cited have had jurisdiction to hear and determine such case; and in all such cases an appeal lies from the decision of a court of assistant commissioner or resident magistrate to the said special court. The rules of the special court of the Bechuana-land Protectorate are contained in High Commissioner's Notice No. 127 of 1920.

The rules, orders, and regulations respecting the manner and form of proceeding in civil and criminal cases before the court of the resident commissioner are, *mutatis mutandis*, and as far as the circumstances of the territory admit, the same as those of the supreme court of the colony of the Cape of Good Hope, and the procedure in the courts of assistant commissioners and resident magistrates is, subject to a similar proviso, the same as that which was in force in the said colony on June 10, 1891. Under High Commissioner's Notice No. 151 of 1925 (published in the official *Gazette* of October 9, 1925) a rule of the court of the resident commissioner provided scales of fees and charges to be taken and made by attorneys of the courts of Bechuana-land Protectorate in civil cases, where the cause of action exceeds £50, and in applications for compulsory sequestration and voluntary surrender of estates as insolvent.

Courts of the assistant resident magistrates, first established in 1898, have such jurisdiction in all matters and cases, civil and criminal, as was conferred prior to June 10, 1891, on the courts of resident magistrates of the colony of the Cape of Good Hope, but their jurisdiction does not extend to cases in which natives belonging to one and the same tribe are concerned, except where it is necessary in the interests of peace or for the prevention or punishment of acts of violence to person or property.

The native chiefs adjudicate in cases arising among natives of their respective tribes, and legislation had recently been introduced, which provides for appeals against judgments of native chiefs in the Bechuanaland Protectorate. Such appeals like in the first instance to a court composed of the assistant commissioner or magistrate of the district and of the chief whose judgment is appealed from. If the assistant commissioner or magistrate and the chief agree, but the complainant is dissatisfied with their decision, a further appeal lies to the resident commissioner. In the event of the assistant commissioner or magistrate and the chief disagreeing, then the resident commissioner decides the matter in dispute.

The jurisdiction of special justices of the peace in the Bechuanaland Protectorate is similar to that which was conferred on special justices of the peace of the Cape Colony prior to June 10, 1891; the punishment which may be inflicted by them on offenders is a fine of £2 or imprisonment with or without hard labour for one month, and all cases tried by them must be sent for review.

Apart from the resident commissioner's court and the special court of the Bechuanaland Protectorate, there are in the territory eleven courts of resident magistrate. There are also a number of justices of the peace throughout the territory.

#### 4. Swaziland

In 1890 a provisional government was established over the territory of Swaziland (which lies to the south-east of the Transvaal), representative of the Swazis, the British, and South African Republican governments. In 1894, under a convention between the two latter Governments, the South African Republic was given powers of protection and administration,

without incorporation, and Swaziland continued to be governed under this form of control until the outbreak of the Boer war in 1899.

In 1902, after the conclusion of the hostilities in the Transvaal, a special commissioner took charge, and under an order-in-council in 1903, the governor of the Transvaal administered the territory through the special commissioner until 1907, when, under an order-in-council of 1906, the high commissioner assumed control and established the present form of administration. Following the order-in-council of 1906, which placed Swaziland directly under the control of the high commissioner for South Africa, a proclamation was issued in March, 1907, providing for the appointment of a resident commissioner, a government secretary, assistant commissioners, and the establishment of a police force. In 1921 the establishment was approved of an advisory council to advise the administration in purely European matters. A council of nine members was elected, five for the southern portion of Swaziland, and four for the northern portion. A second council was re-elected in 1923, a third in 1926, a fourth in 1928, and a fifth in 1932.

*Administration of Justice.* By the Swaziland Administration Proclamation, 1907, a court of resident commissioner, with all the powers of a supreme court, was established. The laws of the Transvaal then in force in Swaziland were re-enacted *mutatis mutandis*, and the Roman-Dutch common law was declared to be in force. In 1912 this proclamation was amended, and a special court was substituted for the resident commissioner's court, with an advocate of the provincial division of the Transvaal as president. The other members of this court consist of the resident commissioner, the deputy resident commissioner, and the assistant commissioners of the various districts. The court holds sessions at least twice a year. All cases which come before it are dealt with by three members sitting without a jury. This court has jurisdiction in all civil and criminal cases arising in Swaziland, including the right of reviewing the proceedings of, and hearing appeals from, any inferior court of justice in Swaziland.

When the court is not in session—

(a) The president of the special court has power to review the criminal proceedings of the courts of assistant commissioner

when the sentence exceeds three months' imprisonment, or a fine of £25, or any sentence of whipping, and to hear appeals in all civil and criminal cases against any judgment, sentence, or final order of the courts of assistant commissioners.

(b) The resident commissioner, or the deputy resident commissioner as a member of the special court, is competent to exercise the civil jurisdiction of the special court in all motions and applications for provisional sentence, and in all cases in which the parties apply to have the case tried before the resident commissioner. In any case other than a review of criminal proceedings, there is a right of appeal to the full court.

Death sentences can only be carried out upon the special warrant of the high commissioner. There is a right of appeal to the Privy Council against any final judgment of the special court where the matter in dispute is of the value of £500 or upwards.

Under the 1907 Proclamation, the high commissioner appointed courts of assistant commissioner with jurisdiction in all civil proceedings in which neither party is a white person, and in criminal proceedings in which the accused is not a white person. These courts have no jurisdiction to try summarily any persons charged with treason, murder, attempt to murder, culpable homicide, rape, attempt to commit rape, or sedition; and in these cases and in other serious cases, preparatory examinations are taken under the Criminal Procedure Code 1903, of the Transvaal, which is in force in Swaziland. The jurisdiction of courts of assistant commissioner as regards white persons, in both civil and criminal matters, is the same as was conferred on magistrates' courts in the Transvaal at that time.

Under the above-mentioned proclamation, the paramount chief and other native chiefs of Swaziland are authorized to continue to exercise jurisdiction according to native law and custom in all civil disputes in which natives only are concerned. An appeal lies from the decision of any such chief to the resident commissioner, whose decision is final.

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## APPENDIX I

### TRADE UNIONS, INDUSTRIAL DISPUTES, AND WAGE REGULATION

PROBLEMS of labour in the Union must always be considered from the point of view of the complications brought into the subject by the existence of the large native and coloured population. This large section of unskilled workers limits to a considerable degree the employment of Europeans to the more skilled occupations or to the work of supervising and controlling the mass of unskilled labour. Nevertheless there is a growing class of unskilled European labourers, who, in competition with the poorly paid non-European labourer, find themselves in a serious position. The standard of living between the European and the non-European is so different that it is almost impossible to find a balance between the two sections. This has introduced social and economic difficulties not found in any other country. The solution of the problem of preventing the European from drifting into the 'poor white' class, a class tending to approximate to the non-European standard of living, with grave results to the health, morality, and civilization of the Union, has become a major task of successive governments.

In order to prevent an increase in the already considerable number of 'poor whites', and possibly to bring about a decrease, a policy known as the 'civilized labour policy' has been adopted by successive governments. As far as the departments of state are concerned, the 'civilized labour policy' adopted by them, is to be found outlined in the Prime Minister's Circular, of the October 31, 1924, which reads as follows:

- (i) The Prime Minister desires it to be understood by all Departments of State that it has been decided as a matter of definite policy that, wherever practicable, civilized labour shall be substituted in all employment by the Government for that which may be classified as uncivilized. Civilized labour is to be considered as the labour rendered by persons, whose standard of living conforms to the standard generally recognized as tolerable from the usual European standpoint. Uncivilized labour is to be regarded as the labour rendered by persons whose aim is restricted to the bare requirements of the necessities of life as understood among barbarous and undeveloped peoples.
- (ii) The system of utilizing the cheapest labour available has no doubt been found to possess certain present advantages, but it is considered that with the exercise of efficient organization and control

the employment of the higher grade capabilities in all classes of work will result in greater and more permanent economic and social advantage.

- (iii) Every Department will, therefore, investigate with the closest attention the avenues in which it is at all practicable to give effect to the principle indicated. A representative of the Department of Labour will be associated with responsible officers in each Department to ensure co-ordination of method, to allow of the wider application of successful experience and to keep the system under helpful observation.
- (iv) Juvenile white labour should be employed wherever possible, and the Department of Labour will welcome any suggestion as to the development of a reasonably permanent career to this class of employee, and the avoidance of ultimate and unmerited stagnation.
- (v) It is desired that, in connexion with any changes consequent upon the introduction of the policy under reference, the Labour Exchanges attached to the Department of Labour should be exclusively utilized, and in the case of any difficulty the Secretary for Labour, Pretoria, should be approached.
- (vi) At the close of the financial year the Prime Minister will desire from each Department a statement showing precisely the action which has been taken in response to this circular, the number and classes of persons replaced, the classes of work upon which they were engaged, the cost of the service under the previous system and the number of persons employed under the new system and the cost, with a statement showing the degree of economic success which has been secured as the result of the change.

Since the issue of the circular, the different government departments have systematically endeavoured to give effect to the policy outlined therein, and in the Railways and Harbours Service the civilized labour policy has had far-reaching effects, a wide field of employment having been opened to European unskilled and semi-skilled labour. In order to assist in relieving unemployment amongst Europeans the provincial administrations and local bodies have also adopted the 'civilized labour policy' to the greatest extent, the difference in the wage-bill cost as between the economic wage and the civilized wage agreed upon being borne in agreed proportions by the central government and the employing body.

The trade union movement in South Africa has been faced with this problem of unskilled native labour. Skilled labour has been dealt with along the lines of minimum rates of pay. Trade unions, in pressing for high minimum rates, have done so with an eye upon native competition. The result has been that it is nearly always more economic (and more patriotic) to employ a European rather than a

native, the minimum rate of pay for each being the same. The practical result of the legislative protection of wages in the skilled trades has been to weaken the trade unions, because wages being protected by law, there has appeared to be no reason for the existence of trade unions.

There have always been two schools of thought amongst European trade unionists. The one has pressed for the organization of natives and European workers into the same trade unions. This, it was argued, would preserve a high level of wages for all workers and there would be no undercutting. The other school of thought, opposed as it is to the granting of any privileges to natives, has rigorously fought the admission of natives to trade unions, and this school of thought has won. Whether it will win in the field of labour competition without legislative assistance is doubtful. Employers, however much the trade unions may harass them, will naturally buy labour in the cheapest market, and especially is such the case as far as unskilled labour is concerned. European labour costing twice as much as non-European labour stands no chance whatsoever. There are a number of non-European trade unions, but up to the present organization difficulties have prevented them from becoming a force.

The Industrial Conciliation Act, 1924, which provides, *inter alia*, for wage agreements between organizations of employers and employees has done something to revive trade unionism amongst skilled workers. The Wage Act, 1925, endeavours to protect the wages of unorganized labour. We propose to examine these two measures.

The primary purpose of the Industrial Conciliation Act, No. 11 of 1924 (as amended by Act No. 24 of 1930), is 'to make provision for the prevention and settlement of disputes between employers and employees by conciliation; and for the registration and regulation of trade unions, employers' organizations, and private registry offices'.

The act applies to every industrial and public utility undertaking, to every industry, trade, and occupation, and to every employer and employee engaged in any such undertaking, industry, trade, or occupation, but it does not extend to agricultural or farming employment or, with certain exceptions, to government employment.

The establishment of industrial councils by employers or registered employers' organizations on the one hand and registered trade unions or groups of registered trade unions on the other hand, for the regulation of matters between them and the prevention and settlement of disputes is provided for. Such councils must consist of an equal number of representatives of employers and employees. Where there

are no industrial councils, conciliation boards may be formed in certain circumstances. Where both parties to any dispute under consideration by any industrial council or conciliation board apply to the minister for the appointment of a mediator, or where the minister thinks that settlement of the dispute would be settled thereby, the minister may appoint a mediator. A majority of representatives of employers and employees respectively on an industrial council or a conciliation board may decide upon the appointment of one or more arbitrators, and where more than one arbitrator is appointed, the appointment of an umpire, who is required to give a decision in the event of the arbitrators failing to agree. Awards made by umpires or arbitrators are binding. It is unlawful to strike or lock-out when an agreement has been arrived at as a result of the appointment of an umpire or arbitrator, or during the period of operation of any award made as the outcome of such appointment. The minister may declare on the application of an industrial council or conciliation board, that any agreement arrived at shall be binding upon the parties thereto, and upon the employers or employees represented on the council or board; or he may, if he is satisfied that in any area the parties to any agreement are sufficiently representative of the undertaking, industry, trade, or occupation concerned, declare that the agreement shall be binding upon all employers and employees in that undertaking, industry, trade, or occupation in that area.

The minister may, upon the recommendation of an industrial council or conciliation board, fix the minimum rate of wages and the maximum number of hours in any week to be worked by persons excluded from the definition of employee in the act. He may also exclude any scheduled native area from the operation of an agreement. One calendar month's notice of any alteration or demand for alteration in the terms of employment must be given by an employer or an employee, unless shorter notice is mutually agreed to. If the matter at issue is submitted for consideration by an industrial council or conciliation board within fourteen days, it must await the determination of the body concerned. Special provision is made for the conduct of any dispute between a local authority and its employees engaged upon work connected with the supply of light, power, water, sanitary, transportation, or fire extinguishing services, which has remained unsettled notwithstanding efforts of any industrial council or conciliation board. It is unlawful for any employer, employer's organization, trade union, or other person, to declare any strike or lock-out, until the matter at issue has been investigated by an industrial council, or where there is no such council, by a conciliation

board, and until any further period stipulated in any agreement between the parties as a period, within which a strike or lock-out shall not be declared, shall have lapsed. The minister may in certain eventualities step in and carry on any municipal service at the expense of the municipality. The act provides penalties for infringements of its provisions and empowers the making of regulations for the effective carrying out of its objects and purposes.

The act also provides for the appointment of a registrar of trade unions and employers' organizations, and for the registration of trade unions and employers' organizations, including unions of government servants. If the registrar is satisfied that in the area in respect of which it is proposed that the union or organization should be operative, no union or organization sufficiently representative of the interests concerned is already registered under the act, he is required to register such union or organization. Every registered trade union and employers' organization is a body corporate, capable in law of suing and being sued. The laws governing companies, insurance companies, and friendly or provident societies do not apply to trade unions or employers' organizations in respect of the exercise by such unions or organizations of any function, or the performance of any act under the act or rules authorized thereunder.

The Industrial Conciliation Act has been extensively and beneficially used by industry, and the record of strikes and lock-outs since this act came into operation has been greatly reduced.

In order to enable industry to avail itself of the provisions of this act, more organization on the part of both the employers and employees is necessary.

The Wage Act, No. 27 of 1925 (as amended by Act No. 23 of 1930), provides for the constitution of a permanent Wage Board for the Union, to consist of three members, with power given to the government to add two members for any particular inquiry—one to represent the employers and one to represent the employees.

The Wage Board begins to function upon a reference by the minister, or on the application of a registered trade union or association of employers, or, where no such registered union or association exists, on the application of employers or employees who satisfy the board as to their representative character. The proviso is made, however, that where there exist registered organizations of both employers and employees sufficiently representative, the board shall not proceed with any investigation in respect of such trade, unless directed to do so by the minister. The object of this proviso is to allow the Industrial Conciliation Act to take its course where possible.

The Wage Act defines the matters which have to be taken into

consideration by the board in investigating wage and labour conditions, and the subjects upon which the board may make a recommendation. The act further provides for duties of inspection, for the maintenance of certain records, and for a complete system of co-operation between the industrial inspectors of the Department of Labour and the investigations of the board, with further co-operation with the Board of Trade and Industries.

The Industrial Conciliation Act has been used by organized masters and workmen; the Wage Act has been created to protect unorganized labour.

## APPENDIX II

### THE RULE OF LAW AS ILLUSTRATED BY THE CASE OF

*In re Willem Kok and Nathaniel Balie*

(1879) Buchanan, 45.

In 1878 Willem Kok and others were arrested in Griqualand East, conveyed to Natal, and thence by steamer to Capetown, and there kept in custody from June 1878 to February 1879, when they made application to the Supreme Court for their release. In their petition they stated that they had not 'since their arrival at Capetown been brought before any magistrate, a judicial tribunal, to be charged with the commission of any crime or offence, nor are they detained in custody under the authority of any lawful warrant or authority.

'Whereupon your petitioners humbly pray that your Lordships will be pleased to inquire by what authority they and their fellow-prisoners are detained in custody, and in default of lawful authority that your Lordships will order their immediate liberation and discharge.'

When this application was brought before court, the court, being of opinion that a *prima facie* case had been made out to justify an inquiry into the cause of detention of these natives, made an order upon their custodian to produce them in court and at the same time to furnish a statement of the cause of their detention. This order is analogous to the writ *de homine libero exhibendo* of the Roman-Dutch law or the writ of *habeas corpus* of the English law. The justification put forward for the detention of the prisoners was that they were prisoners of war. It appeared that there had been a rebellion over the appointment of a chief and the prisoners, after the rebellion had been quelled, fled, and were captured.

DE VILLIERS C.J. in his judgment releasing the prisoners stated: 'It is unnecessary to consider the rights which under the Roman-Dutch law free persons had to a release or to the writ *de homine libero exhibendo*, for, in my opinion, the rights of the personal liberty, which persons within this colony enjoy, are substantially the same, since the abolition of slavery, as those which are possessed in Great Britain. Where those rights are violated this Court would at least have the same power of restraining such violation as the Supreme Court of Holland had to interdict the infringement without sufficient cause of the rights to personal liberty as understood by the Roman-Dutch law. But in addition to the powers vested in this Court under the Roman-Dutch law, there are certain statutory provisions which not only add to the powers of the Court, but make it the bounden duty of the Court to protect personal liberty whenever it is illegally infringed



upon. The Charter of Justice, after reciting in its preamble that it is expedient to make provision for the better and more effectual administration of justice in the Cape of Good Hope and in several territories and settlements dependant thereupon, and for that purpose to constitute within the said colony and its dependencies a Supreme Court of Justice, enacts in the 30th section that the said Supreme Court shall have cognizance of all pleas and jurisdiction in all causes, whether civil, criminal or mixed, arising within the said colony, with jurisdiction over Her Majesty's subjects and all other persons whomsoever residing and being within the said colony in as full and ample a manner as the then existing Supreme Court of Justice had or could lawfully exercise the same. The Charter of Justice came into operation in February, 1834, but the powers of the Supreme Court in criminal matters had been clearly defined by Ordinance No. 40 of 1828, and these powers were confirmed by the Charter. The first section of the Ordinance enacts that "All crimes and all offences against the law (for the commission of which any penalty or punishment is by law provided) committed by any person in this colony, or its dependencies, are subject to the jurisdiction of the Supreme Court". In the case of any Judge of an inferior court or a Magistrate illegally committing a person to prison, it is competent for such prisoner under the 54th Section of the Ordinance, "to apply to the Supreme Court or to the Circuit Court of the district within which he is imprisoned; or in case neither of these Courts shall be then sitting, to the Chief Justice or any of the judges of the Supreme Court, who shall make such order thereon as to them in the circumstances of the case shall seem just", and by the 65th section of the same Ordinance the Supreme Court and Circuit Courts are required at the close of each of their sessions to discharge all such persons as by law shall then be entitled to liberation. Supposing that the applicants had been detained in one of the ordinary gaols of the colony, and it had been brought to the notice of the Court that they were so kept without a lawful warrant, it surely would have been competent for the Court to call upon the gaoler to produce the prisoners and justify the detention. Can it then make any difference that they are detained in a military fortress instead of an ordinary gaol? I think not. In either case the person in whose custody they are is bound to produce his warrant or other authority for detaining them, and in case the return to the order of Court be found to be clearly bad it would be the duty of this Court, under ordinary circumstances to order their discharge. But then it is said that the Country is in such an unsettled state, that the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances

might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country. If a different argument were to prevail, it might so happen that injustice towards individual natives has disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance. Far be it from me to say that such is the case in the present instance — on the contrary, it is clear that the government acted with the best motives, and that the disturbance in Griqualand East was not in any way caused by the arrest of the applicant, but I am merely pointing out the natural consequences of an argument which has been urged upon the Court. Undoubtedly occasions have arisen, and may again arise, when civil jurisdiction is suspended and the ordinary forms of trial are held in abeyance, and in consequence Martial Law is proclaimed, but such a proclamation can only be justified, if at all, as an absolute necessity, and by way of self-defence, and cannot continue in force after the occasion which gave rise to it has ceased to exist. It is a power which may be exercised by the military authorities but they do so at their own peril, and cannot expect the assistance of any Civil Court in carrying it out. The Civil Courts have but one duty to perform, and that is to administer the laws of the Country without fear, favour, or prejudice, independently of the consequences which ensue. In the case of Nehemia Moshesh, who was tried before me at King William's Town for sedition at the instance of the late Government, I told the jury that their sole duty was to decide upon the evidence whether or not his guilt had been established, and that they ought not to inquire what effect his liberation might have had on the minds of the natives generally. The jury acquitted the prisoner, but I am not aware that this simple act of justice produced such disastrous consequences as were anticipated by some at the time. Thus far I have assumed that the applicants are aliens, but some of the arguments which were adduced before the Court went upon the assumption that they are British Subjects . . .

The matter, therefore, now stands thus, either East Griqualand is British territory and the Griquas are British subjects or not. If the country is not British territory, and its inhabitants are not British subjects, Captain Blyth was an intruder, without any right or power whatever to exercise civil and criminal jurisdiction over the Griquas, and the Griquas had a perfect right to resist him in his attempt to arrest some of them for offences committed in Griqualand East, or otherwise to exercise jurisdiction over them. Suppose, for example, that an official of the Government were to attempt to exercise

civil and criminal jurisdiction in the Orange Free State, and arrested subjects of that State, who by force of arms resisted his authority, it could not for a moment be maintained that the persons thus arrested if brought into this colony are prisoners of war whom the Government may detain for an indefinite time. If Griqualand East is not British territory, there can be no difference between the two cases except perhaps this: that in the former case an immediate demand would be made by the Free State Government on the Government of this Colony for the surrender of the prisoners, whereas in the case of the Griquas the *de facto*, if not *de jure* Government of East Griqualand, being dependent on the Cape Government, such a demand would be impossible—a difference which, if it has any weight at all, ought to weigh in favour of the applicants. An attempt was indeed made at the first hearing to show that although East Griqualand remained Griqua territory, Captain Blyth was entitled to exercise jurisdiction over the inhabitants as a British resident appointed by the Crown, but no evidence was adduced in support of this view. On the contrary, as I have more than once remarked, the sole jurisdiction brought forward by Captain Blyth for his conduct is the alleged fact that the country is British territory, and its inhabitants are British subjects. But if this view be correct, it is perfectly clear that the return, stating that the applicants are prisoners of war, cannot be sustained.

As British subjects they would be entitled to be brought to trial within a reasonable time after their arrest, and to resist the claim of the Crown to keep them in confinement for an indefinite period as prisoners of war. After they had been detained for nearly twelve months an opportunity to bring them to trial was offered to the Crown, but Mr. Cole, in the exercise of his discretion as Counsel of the Crown, refused to avail himself of the opportunity. The only course, therefore, which is now open to the Court is to order the immediate discharge of the applicants.'

See also *Sigcau v. The Queen*, 12 S.C. 256; *In re Marechane*, 1 S.A.R. 27.

### APPENDIX III

## STATUTE OF WESTMINSTER, 1931

(22 Geo. V, c. 4)

An Act to give effect to certain resolutions passed A.D. 1931.  
by Imperial Conferences held in the years 1926  
and 1930. [11th December 1931.]

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

A.D. 1931.

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Meaning of  
'Dominion' in  
this Act.

1.<sup>1</sup> In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

Validity of  
laws made  
by Parliament  
of a Dominion.  
28 & 29 Vict.  
c. 93.

2.<sup>1</sup>—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Power of  
Parliament of  
Dominion to  
legislate extra-  
territorially.

3.<sup>1</sup> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

Parliament of  
United King-  
dom not to  
legislate for  
Dominion  
except by  
consent.

4.<sup>1</sup> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5.<sup>1</sup> Without prejudice to the generality of the fore-

<sup>1</sup> Re-enacted in the Schedule to the Status of the Union Act, 1934. See Appendix VII.

going provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

A.D. 1931.  
Powers of  
Dominion  
Parliaments  
in relation  
to merchant  
shipping.  
57 & 58 Vict.  
c. 60.

6.<sup>1</sup> Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

Powers of  
Dominion  
Parliaments  
in relation  
to Courts of  
Admiralty.  
53 & 54 Vict.  
c. 27.

7.—(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1910, or any order, rule or regulation made thereunder.

Saving for  
British  
North  
America  
Acts and  
application  
of the Act  
to Canada.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

Saving for  
Constitution  
Acts of  
Australia  
and New  
Zealand.

9.—(1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

Saving  
with respect  
to States of  
Australia.

<sup>1</sup> Re-enacted in the Schedule of the Status of the Union Act, 1934. See Appendix VII.

A.D. 1931.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

Certain  
sections of  
Act not to  
apply to  
Australia,  
New Zealand  
or Newfound-  
land unless  
adopted.

10.—(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand, and Newfoundland.

Meaning of  
'Colony' in  
future Acts.  
52 & 53 Vict.  
c. 63.

11.<sup>1</sup> Notwithstanding anything in the Interpretation Act, 1889, the expression 'Colony' shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

Short title.

12.<sup>1</sup> This Act may be cited as the Statute of Westminster, 1931.

<sup>1</sup> Re-enacted in the Schedule of the Status of the Union Act, 1934. See Appendix VII.

APPENDIX IV<sup>1</sup>

SOUTH AFRICA ACT, 1909. AS AMENDED UP TO  
DECEMBER 31, '1933

SOUTH AFRICA ACT, 1909

9 EDWARD VII

CHAPTER 9

An Act to constitute the Union of South Africa

[20th September, 1909.]

WHEREAS it is desirable for the welfare and future progress of South Africa that theseveral British Colonies therein should be united under one Government in a legislative union under the Crown of Great Britain and Ireland:

And whereas it is expedient to make provision for the union of the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony on terms and conditions to which they have agreed by resolution of their respective Parliaments, and to define the executive, legislative, and judicial powers to be exercised in the government of the Union:

And whereas it is expedient to make provision for the establishment of provinces with powers of legislation and administration in local matters and in such other matters as may be specially reserved for provincial legislation and administration:

And whereas it is expedient to provide for the eventual admission into the Union or transfer to the Union of such parts of South Africa as are not originally included therein:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:— 75, 84.

PART I

PRELIMINARY

Sovereignty and Guidance of Almighty God acknowledged.

1.<sup>2</sup> *The people of the Union acknowledge the sovereignty and guidance of Almighty God.* 75, 109, 110.

<sup>1</sup> Note: A figure at the end of a section indicates the page of the book at which the section is dealt with. The marginal headings are printed in bold type.

<sup>2</sup> As substituted by section 1 of Act No. 9 of 1925.



**Definitions.**

2.<sup>1</sup> In this Act, unless it is otherwise expressed or implied, the words 'the Union' shall be taken to mean the Union of South Africa as constituted under the Act, and the words 'Houses of Parliament', 'House of Parliament', or 'Parliament', shall be taken to mean the Parliament of the Union. 75.

**Application of Act to King's Successors.**

3. The provisions of this Act referring to the King shall extend to His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland. 75.

**PART II****THE UNION****Proclamation of Union.**

4. It shall be lawful for the King, with the advice of the Privy Council, to declare by proclamation that, on and after a date therein appointed, not being later than one year after the passing of this Act, the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony, hereinafter called the Colonies, shall be united in a legislative union under one Government under the name of the Union of South Africa. On and after the day appointed by such proclamation the Government and Parliament of the Union shall have full power and authority within the limits of the Colonies, but the King may at any time after the proclamation appoint a Governor-General for the Union. 75.

**Commencement of Act.**

5. The provisions of this Act shall, unless it is otherwise expressed or implied, take effect on and after the day so appointed.

**Incorporation of Colonies into the Union.**

6. The Colonies mentioned in section *four* shall become original provinces of the Union under the names of Cape of Good Hope, Natal, Transvaal, and Orange Free State, as the case may be. The original provinces shall have the same limits as the respective Colonies at the establishment of the Union. 76.

**Application of 58 and 59 Vict. c. 34, &c.**

7. Upon any Colony entering the Union, the Colonial Boundaries Act, 1895, and every other Act applying to any of the Colonies as

<sup>1</sup> See the reference to the parliament of the Union in section 2 of the Status of the Union Act, 1934, and the meaning of 'heirs and successors' under section 5 of that Act. (Appendix VII.)

being self-governing Colonies or Colonies with responsible government, shall cease to apply to that Colony, but as from the date when this Act takes effect every such Act of Parliament shall apply to the Union.

### PART III.

#### EXECUTIVE GOVERNMENT

##### Executive Power.

8.<sup>1</sup> The Executive Government of the Union is vested in the King, and shall be administered by His Majesty in person or by a Governor-General as his representative. 76, 116.

##### Governor-General.

9. The Governor-General shall be appointed by the King, and shall have and may exercise in the Union during the King's pleasure, but subject to this Act, such powers and functions of the King as His Majesty may be pleased to assign to him. 76, 117, 124.

##### Salary of Governor-General.

10. There shall be payable to the King out of the Consolidated Revenue Fund of the Union for the salary of the Governor-General an annual sum of ten thousand pounds. The salary of the Governor-General shall not be altered during his continuance in office. 134.

##### Application of Act to Governor-General.

11. The provisions of this Act relating to the Governor-General extend and apply to the Governor-General for the time being or such person as the King may appoint to administer the government of the Union. The King may authorize the Governor-General to appoint any person to be his deputy within the Union during his temporary absence, and in that capacity to exercise for and on behalf of the Governor-General during such absence all such powers and authorities vested in the Governor-General as the Governor-General may assign to him, subject to any limitations expressed or directions given by the King; but the appointment of such deputy shall not affect the exercise by the Governor-General himself of any power or function. 121.

##### Executive Council.

12. There shall be an Executive Council to advise the Governor-General in the government of the Union, and the members of the council shall be chosen and summoned by the Governor-General

<sup>1</sup> See sections 4 and 11 (1) of the Status of the Union Act, 1934. (Appendix VII.)

and sworn as executive councillors, and shall hold office during his pleasure. 139, 140.

#### Meaning of Governor-General-in-Council.

13. The provisions of this Act referring to the Governor-General-in-Council shall be considered as referring to the Governor-General acting with the advice of the Executive Council. 140.

#### Appointment of Ministers.

14.<sup>1</sup> (1) The Governor-General may appoint officers not exceeding eleven in number to administer such departments of State of the Union as the Governor-General-in-Council may establish; such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the King's Ministers of State for the Union. After the first general election of members of the House of Assembly, as hereinafter provided, no minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament.

*2(2) Whenever any Minister of State is from any cause whatever unable to perform any of the functions of his office, the Governor-General-in-Council may appoint any member of the Executive Council (whether he has or has not been appointed as a Minister of State, under sub-section (1) to act in the said Minister's stead, either generally or in the performance of any particular function.* 26, 141.

#### Appointment and Removal of Officers.

15.<sup>3</sup> The appointment and removal of all officers of the public service of the Union shall be vested in the Governor-General-in-Council, unless the appointment is delegated by the Governor-General-in-Council or by this Act or by a law of Parliament to some other authority. 76, 377.

#### Transfer of Executive Powers to Governor-General-in-Council.

16. All powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in the Governor or in the Governor-in-Council, or in any authority of the Colony, shall, as far as the same continue in existence and are capable of being exercised after the establishment of the Union, be vested in the Governor-General or in the Governor-General-in-Council, or in the authority exercising similar powers under the Union, as the case

<sup>1</sup> As amended by section 1 of Act No. 34 of 1925.

<sup>2</sup> Added by section 1 of Act No. 17 of 1933.

<sup>3</sup> See section 19 of Act No. 27 of 1923.

may be, except such powers and functions as are by this Act or may by a law of Parliament be vested in some other authority. 76.

#### **Command of Naval and Military Forces.**

17. The command-in-chief of the naval and military forces within the Union is vested in the King or in the Governor-General as his representative.

#### **Seat of Government.**

18. Save as in section *twenty-three* excepted, Pretoria shall be the seat of Government of the Union. 60, 65, 76, 211.

### **PART IV PARLIAMENT**

#### **Legislative Power.**

19. The legislative power of the Union shall be vested in the Parliament of the Union, herein called Parliament, which shall consist of the King, a Senate, and a House of Assembly. 76, 183.

#### **Sessions of Parliament.**

20.<sup>1</sup> The Governor-General may appoint such times for holding the sessions of Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue Parliament, and may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone provided that the Senate shall not be dissolved within a period of ten years after the establishment of the Union, and provided further that the dissolution of the Senate shall not affect any senators nominated by the Governor-General-in-Council. 205, 210, 211, 245-248.

#### **Summoning of First Parliament.**

21. Parliament shall be summoned to meet not later than six months after the establishment of the Union. 210.

#### **Annual Session of Parliament.**

22. There shall be a session of Parliament once at least in every year, so that a period of twelve months shall not intervene between the last sitting of Parliament in one session and its first sitting in the next session. 210.

#### **Seat of Legislature.**

23. Capetown shall be the seat of the Legislature of the Union. 60, 65, 76, 211.

<sup>1</sup> See section 1 of Act No. 54 of 1920 regarding dissolution of the senate; see also section 1 of Act No. 9 of 1920.

## SENATE

## Original Constitution of Senate.

24.<sup>1</sup> For ten years after the establishment of the Union the constitution of the Senate shall, in respect of the original provinces, be as follows:—

- (i) *Eight senators shall be nominated by the Governor-General-in-Council, and for each original province eight senators shall be elected in the manner hereinafter provided:*
- (ii) *The senators to be nominated by the Governor-General-in-Council shall hold their seats for ten years. One-half of their number shall be selected on the ground mainly of their thorough acquaintance, by reason of their official experience, or otherwise, with the reasonable wants and wishes of the coloured races in South Africa. If the seat of a senator so nominated shall become vacant, the Governor-General-in-Council shall nominate another person to be a senator, who shall hold his seat for ten years.*
- (iii) *After the passing of this Act, and before the day appointed for the establishment of the Union, the Governor of each of the Colonies shall summon a special sitting of both Houses of the Legislature, and the two Houses sitting together as one body and presided over by the Speaker of the Legislative Assembly shall elect eight persons to be senators for the province. Such senators shall hold their seats for ten years. If the seat of a senator so elected shall become vacant, the provincial council of the province for which such senator has been elected shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat.*

71, 76, 188, 246, 448, 518.

## Subsequent Constitution of Senate.

25.<sup>2</sup> Parliament may provide for the manner in which the Senate shall be constituted after the expiration of ten years, and unless and until such provision shall have been made—

- (i) *the provisions of the last preceding section with regard to nominated senators shall continue to have effect;*
- (ii) *eight senators for each province shall be elected by the members of the provincial council of such province together with the members of the House of Assembly elected for such province. Such senators shall hold their seats for ten years unless*

<sup>1</sup> See footnote, p. 563.

<sup>2</sup> See section 1 of Act No. 54 of 1926 regarding dissolution of the senate.

the Senate be sooner dissolved. If the seat of an elected senator shall become vacant, the members of the provincial council of the province, together with the members of the House of Assembly elected for such province, shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat. The Governor-General-in-Council shall make regulations for the joint election of senators prescribed in this section. 76, 246.

#### Qualifications of Senators.

26.<sup>1</sup> The qualifications of a senator shall be as follows:—  
He must—

- (a) be not less than thirty years of age;
- (b) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces;
- (c) have resided for five years within the limits of the Union as existing at the time when he is elected or nominated, as the case may be;
- (d) be a British subject of European descent;
- (e) in the case of an elected senator, be the registered owner of immovable property within the Union of the value of not less than five hundred pounds over and above any special mortgages thereon.

For the purposes of this section, residence in, and property situated within, a Colony before its incorporation in the Union shall be treated as residence in and property situated within the Union.

13, 26, 188, 190, 212.

#### Appointment and Tenure of Office of President.

27. The Senate shall, before proceeding to the dispatch of any other business, choose a senator to be the President of the Senate, and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President. The President shall cease to hold office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office by writing under his hand addressed to the Governor-General. 214.

#### Deputy-President.

28. Prior to or during any absence of the President the Senate may choose a senator to perform his duties in his absence. 217.

#### Resignation of Senators.

29. A senator may, by writing under his hand addressed to the Governor-General, resign his seat, which thereupon shall become

<sup>1</sup> See section 6 of the Status of the Union Act, 1934. (Appendix VII) in regard to sub-clause (d). See also section 4 (2) of Act No. 18 of 1930.

vacant. The Governor-General shall as soon as practicable cause steps to be taken to have the vacancy filled. 188.

### Quorum.

30. The presence of at least twelve senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

### Voting in the Senate.

31. All questions in the Senate shall be determined by a majority of votes of senators present other than the President or the presiding senator, who shall, however, have and exercise a casting vote in the case of an equality of votes.

## HOUSE OF ASSEMBLY

### Constitution of House of Assembly.

32. The House of Assembly shall be composed of members directly chosen by the voters of the Union in electoral divisions delimited as hereinafter provided. 76, 191, 195.

### Original Number of Members.

33. The number of members to be elected in the original provinces at the first election and until the number is altered in accordance with the provisions of this Act shall be as follows:—

Cape of Good Hope	.	.	.	Fifty-one.
Natal	.	.	.	Seventeen.
Transvaal	.	.	.	Thirty-six.
Orange Free State	.	.	.	Seventeen.

These numbers may be increased as provided in the next succeeding section, but shall not, in the case of any original province, be diminished until the total number of members of the House of Assembly in respect of the provinces herein provided for reaches one hundred and fifty, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period. 71, 99, 192.

### Increase of Number of Members.

34.<sup>1</sup> The number of members to be elected in each province, as provided in section *thirty-three*, shall be increased from time to time as may be necessary in accordance with the following provisions:—

- (i) The quota of the Union shall be obtained by dividing the total number of European male adults in the Union, as ascertained at the census of nineteen hundred and four, by the total number of members of the House of Assembly as constituted at the establishment of the Union.

<sup>1</sup> See Act No. 2 of 1910; section 1 of Act No. 31 of 1918, and also Act No. 15 of 1918.

- (ii) In nineteen hundred and eleven, and every five years thereafter, a census of the European population of the Union shall be taken for the purposes of this Act:
- (iii) After any such census the number of European male adults in each province shall be compared with the number of European male adults as ascertained at the census of nineteen hundred and four, and, in the case of any province where an increase is shown, as compared with the census of nineteen hundred and four, equal to the quota of the Union, or any multiple thereof, the number of members allotted to such province in the last preceding section shall be increased by an additional member or an additional number of members equal to such multiple, as the case may be:
- (iv) Notwithstanding anything herein contained, no additional member shall be allotted to any province until the total number of European male adults in such province exceeds the quota of the Union multiplied by the number of members allotted to such province for the time being, and thereupon additional members shall be allotted to such province in respect only of such excess:
- (v) As soon as the number of members of the House of Assembly to be elected in the original provinces in accordance with the preceding sub-sections reaches the total of one hundred and fifty, such total shall not be further increased unless and until Parliament otherwise provides; and subject to the provisions of the last preceding section the distribution of members among the provinces shall be such that the proportion between the number of members to be elected at any time in each province and the number of European male adults in such province as ascertained at the last preceding census, shall as far as possible be identical throughout the Union:
- (vi) 'Male adults' in this Act shall be taken to mean males of twenty-one years of age or upwards not being members of His Majesty's regular forces on full pay:
- (vii) For the purposes of this Act the number of European male adults, as ascertained at the census of nineteen hundred and four, shall be taken to be—

For the Cape of Good Hope . . . . .	167,546
For Natal . . . . .	34,784
For the Transvaal . . . . .	106,493
For the Orange Free State . . . . .	41,014

99, 108, 192, 196.



### Qualifications of Voters.

35.<sup>1</sup> (1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

(2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour. 76, 197, 239.

### Application of Existing Qualifications.

36.<sup>2</sup> Subject to the provisions of the last preceding section, the qualifications of parliamentary voters, as existing in the several Colonies at the establishment of the Union, shall be the qualifications necessary to entitle persons in the corresponding provinces to vote for the election of members of the House of Assembly: Provided that no member of His Majesty's regular forces on full pay shall be entitled to be registered as a voter. 13, 76, 197.

### Elections.

37.<sup>3</sup> (1) Subject to the provisions of this Act, the laws in force in the Colonies at the establishment of the Union relating to elections for the more numerous Houses of Parliament in such Colonies respectively, the registration of voters, the oaths or declarations to be taken by voters, returning officers, the powers and duties of such officers, the proceedings in connexion with elections, election expenses, corrupt and illegal practices, the hearing of election petitions and the proceedings incident thereto, the vacating of seats of members, and the proceedings necessary for filling such vacancies, shall, *mutatis mutandis*, apply to the elections in the respective provinces of members of the House of Assembly.

(2) Notwithstanding anything to the contrary in any of the said

<sup>1</sup> Cf. paragraph vii of the Royal Instructions (Appendix VI).

<sup>2</sup> See section 144 of Act No. 12 of 1918; Act No. 18 of 1930; Act No. 41 of 1931.

<sup>3</sup> See section 36 (2) of Act No. 12 of 1918; Acts Nos. 11 of 1920; 23 of 1926; 24 of 1928; 35 of 1931.

laws contained, at any general election of members of the House of Assembly, all polls shall be taken on one and the same day in all the electoral divisions throughout the Union, such day to be appointed by the Governor-General-in-Council. 13, 76, 197, 204, 208.

#### Commission for Delimitation of Electoral Divisions.

38. Between the date of the passing of this Act and the date fixed for the establishment of the Union, the Governor-in-Council of each of the Colonies shall nominate a judge of any of the Supreme or High Courts of the Colonies, and the judges so nominated shall, upon acceptance by them respectively of such nomination, form a joint commission, without any further appointment, for the purpose of the first division of the provinces into electoral divisions. The High Commissioner for South Africa shall forthwith convene a meeting of such commission at such time and place in one of the Colonies as he shall fix and determine. At such meeting the Commissioners shall elect one of their number as chairman of such commission. They shall thereupon proceed with the discharge of their duties under this Act, and may appoint persons in any province to assist them or to act as assessors to the commission or with individual members thereof for the purpose of inquiring into matters connected with the duties of the commission. The commission may regulate their own procedure and may act by a majority of their number. All moneys required for the payment of the expenses of such commission before the establishment of the Union in any of the Colonies shall be provided by the Governor-in-Council of such Colony. In case of the death, resignation, or other disability of any of the Commissioners before the establishment of the Union, the Governor-in-Council of the Colony in respect of which he was nominated shall forthwith nominate another judge to fill the vacancy. After the establishment of the Union the expenses of the commission shall be defrayed by the Governor-General-in-Council, and any vacancies shall be filled by him. 195.

#### Electoral Divisions.

39. The commission shall divide each province into electoral divisions, each returning one member. 195.

#### Method of Dividing Provinces into Electoral Divisions.

40. (1) For the purpose of such division as is in the last preceding section mentioned, the quota of each province shall be obtained by dividing the total number of voters in the province, as ascertained at the last registration of voters, by the number of members of the House of Assembly to be elected therein.

(2) Each province shall be divided into electoral divisions in such a manner that each such division shall, subject to the provisions of sub-section (3) of this section, contain a number of voters, as nearly as may be, equal to the quota of the province.

(3) The Commissioners shall give due consideration to---

- (a) community or diversity of interests;
- (b) means of communication;
- (c) physical features;
- (d) existing electoral boundaries;
- (e) sparsity or density of population;

in such manner that, while taking the quota of voters as the basis of division, the Commissioners may, whenever they deem it necessary, depart therefrom, but in no case to any greater extent than fifteen per centum more or fifteen per centum less than the quota. 195.

#### Alteration of Electoral Divisions.

41.<sup>1</sup> As soon as may be after every quinquennial census, the Governor-General-in-Council shall appoint a commission consisting of three judges of the Supreme Court of South Africa to carry out any re-division which may have become necessary as between the different electoral divisions in each province, and to provide for the allocation of the number of members to which such province may have become entitled under the provisions of this Act. In carrying out such re-division and allocation the commission shall have the same powers and proceed upon the same principles as are by this Act provided in regard to the original division. 195.

#### Powers and Duties of Commission for Delimiting Electoral Divisions.

42.<sup>1</sup> (1) The joint commission constituted under section *thirty-eight*, and any subsequent commission appointed under the provisions of the last preceding section, shall submit to the Governor-General-in-Council—

- (a) a list of electoral divisions, with the names given to them by the commission and a description of the boundaries of every such division;
- (b) a map or maps showing the electoral divisions into which the provinces have been divided;
- (c) such further particulars as they consider necessary.

(2) The Governor-General-in-Council may refer to the commission for its consideration any matter relating to such list or arising out of the powers or duties of the commission.

<sup>1</sup> See section 3 of Act No. 18 of 1930.

(3) The Governor-General-in-Council shall proclaim the names and boundaries of the electoral divisions as finally settled and certified by the commission, or a majority thereof, and thereafter, until there shall be a re-division, the electoral divisions as named and defined shall be the electoral divisions of the Union in the provinces.

(4) If any discrepancy shall arise between the description of the divisions and the aforesaid map or maps, the description shall prevail. 195.

**Date from which Alteration of Electoral Divisions to take effect.**

43. Any alteration in the number of members of the House of Assembly to be elected in the several provinces, and any re-division of the provinces into electoral divisions, shall, in respect of the election of members of the House of Assembly, come into operation at the next general election held after the completion of the re-division or of any allocation consequent upon such alteration, and not earlier. 195.

**Qualifications of Members of House of Assembly.**

44.<sup>1</sup> The qualifications of a member of the House of Assembly shall be as follows:—

He must—

- (a) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces;
- (b) have resided for five years within the limits of the Union as existing at the time when he is elected;
- (c) be a British subject of European descent.

For the purposes of this section, residence in a Colony before its incorporation in the Union shall be treated as residence in the Union.

191.

**Duration.**

45. Every House of Assembly shall continue for five years from the first meeting thereof, and no longer, but may be sooner dissolved by the Governor-General.

**Appointment and Tenure of Office of Speaker.**

46. The House of Assembly shall, before proceeding to the dispatch of any other business, choose a member to be the Speaker of the House, and, as often as the office of Speaker becomes vacant, the House shall again choose a member to be the Speaker. The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his

<sup>1</sup> See section 37 of Act No. 12 of 1918 as amended by section 27 of Act No. 11 of 1920. See footnotes to sections 36 and 37 *supra*; see section 6 of the Status of the Union Act, 1934 (Appendix VII).

office or his seat by writing under his hand addressed to the Governor-General. 215.

#### Deputy-Speaker.

47. Prior to or during the absence of the Speaker, the House of Assembly may choose a member to perform his duties in his absence. 217.

#### Resignation.

48.<sup>1</sup> A member may, by writing under his hand addressed to the Speaker, or if the Speaker is absent from the Union, to the Governor-General, resign his seat, which shall thereupon become vacant.

#### Quorum.

49. The presence of at least thirty members of the House of Assembly shall be necessary to constitute a meeting of the House for the exercise of its powers.

#### Voting in House of Assembly.

50. All questions in the House of Assembly shall be determined by a majority of votes of members present other than the Speaker or the presiding member, who shall, however, have and exercise a casting vote in the case of an equality of votes.

### BOTH HOUSES OF PARLIAMENT

#### Oath or Affirmation of Allegiance.

51.<sup>2</sup> Every senator and every member of the House of Assembly shall, before taking his seat, make and subscribe before the Governor-General, or some person authorized by him, an oath or affirmation of allegiance in the following form:—

##### *Oath*

I, A.B., do swear that I will be faithful and bear true allegiance to His Majesty [*here insert the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being*] His [*or Her*] heirs and successors according to law. So help me God.

##### *Affirmation*

I, A.B., do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to His Majesty [*here insert the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being*] His [*or Her*] heirs and successors according to law. 184, 213–215.

<sup>1</sup> Repealed by section forty-nine (1), Act No. 11 of 1926. See Subsection (2) thereof, which is to the same effect.

<sup>2</sup> See section 7 of the Status of the Union Act, 1934 (Appendix VII), where the new form of oath is printed.

Members of either House disqualified for being Member of the other House.

52. A member of either House of Parliament shall be incapable of being chosen or of sitting as a member of the other House: Provided that every Minister of State who is a member of either House of Parliament shall have the right to sit and speak in the Senate and the House of Assembly, but shall vote only in the House of which he is a member. 18, 191.

#### Disqualifications for being a Member of either House.

53.<sup>1</sup> No person shall be capable of being chosen or of sitting as a senator or as a member of the House of Assembly who—

- (a) has been at any time convicted of any crime or offence for which he shall have been sentenced to imprisonment without the option of a fine for a term of not less than twelve months, unless he shall have received a grant of amnesty or a free pardon, or unless such imprisonment shall have expired at least five years before the date of his election; or
- (b) is an unrehabilitated insolvent; or
- (c) is of unsound mind, and has been so declared by a competent court; or
- (d) holds any office of profit under the Crown within the Union: Provided that the following persons shall not be deemed to hold an office of profit under the Crown for the purposes of this sub-section:
  - (1) a Minister of State for the Union;
  - (2) a person in receipt of a pension from the Crown;
  - (3) an officer or member of His Majesty's naval or military forces on retired or half-pay, or an officer or member of the naval or military forces of the Union whose services are not wholly employed by the Union.

191, 192.

#### Vacation of Seats.

54.<sup>2</sup> If a senator or member of the House of Assembly—

- (a) becomes subject to any of the disabilities mentioned in the last preceding section; or
- (b) ceases to be qualified as required by law; or
- (c) fails for a whole ordinary session to attend without the special leave of the Senate or the House of Assembly, as the case may be;

his seat shall thereupon become vacant.

192.

<sup>1</sup> See section 1 of Act No. 10 of 1915; section 1 of Act No. 23 of 1920; section 27 of Act No. 11 of 1926. See section 2 of Act No. 17 of 1933 for new subsection (4) regarding justices of the peace. <sup>2</sup> See section 51 of Act No. 11 of 1926.

**Penalty for Sitting or Voting when Disqualified.**

55. If any person who is by law incapable of sitting as a senator or member of the House of Assembly shall, while so disqualified and knowing or having reasonable grounds for knowing that he is so disqualified, sit or vote as a member of the Senate or the House of Assembly, he shall be liable to a penalty of one hundred pounds for each day on which he shall so sit or vote, to be recovered on behalf of the Treasury of the Union by action in any Superior Court of the Union.

192.

**Allowances of Members.**

56.<sup>1</sup> (1) *Subject to the provisions of this section, every member of the Senate and the House of Assembly (excluding Ministers receiving a salary under the Crown, the President of the Senate and the Speaker of the House of Assembly) shall receive an allowance of seven hundred pounds per annum.*

(2) *For every day during which any such member fails to attend a meeting of the House of which he is a member there shall be deducted the sum of two pounds: Provided that such member shall be exempted from deductions on account of such failure—*

- (a) for any day on which he attends a meeting of any Committee of the House for which he is a member; and*
- (b) when his absence is due to his illness or to the summons or subpoena of a competent Court (except a summons to answer a criminal charge upon which he is convicted); and*
- (c) when his absence is due to the death or serious illness of his wife and such absence is condoned by the Sessional Committee on Standing Orders of the Senate or the Committee on Standing Rules and Orders of the House of Assembly (as the case may be); and*
- (d) in respect of any further period of absence not exceeding fifteen days on which he so fails to attend during a session at which the estimates of expenditure for the ordinary administrative services of a financial year are considered.*

(3) *Subject to the deductions incurred, if any, the Clerk of the House concerned shall pay to every such member of the House of which he is Clerk the allowance aforesaid in monthly instalments, the first month to be reckoned from the date notified in the Gazette as the date on which the member concerned was nominated or elected (as the case may be).*

(4) *The amount of the allowances paid under this section shall be charged annually to the Consolidated Revenue Fund and the provision*

<sup>1</sup> As substituted by section 1 of Act No. 51 of 1926; see sections 4 and 11 of Act No. 21 of 1932.

*of this sub-section shall be deemed to be an appropriation of every such amount.* 183.

### Privileges of Houses of Parliament.

57.<sup>1</sup> The powers, privileges, and immunities of the Senate and of the House of Assembly and of the members and committees of each House shall, subject to the provisions of this Act, be such as are declared by Parliament, and until declared shall be those of the House of Assembly of the Cape of Good Hope and of its members and committees at the establishment of the Union. 72, 108, 251.

### Rules of Procedure.

58. Each House of Parliament may make rules and orders with respect to the order and conduct of its business and proceedings. Until such rules and orders shall have been made the rules and orders of the Legislative Council and House of Assembly of the Cape of Good Hope at the establishment of the Union shall *mutatis mutandis* apply to the Senate and House of Assembly respectively. If a joint sitting of both Houses of Parliament is required under the provisions of this Act, it shall be convened by the Governor-General by message to both Houses. At any such joint sitting the Speaker of the House of Assembly shall preside and the rules of the House of Assembly shall, as far as practicable, apply. 72, 219, 230, 239.

## POWERS OF PARLIAMENT

### Powers of Parliament.

59.<sup>2</sup> Parliament shall have full power to make laws for the peace, order, and good government of the Union. 76, 93, 97.

### Money Bills.

60. (1) Bills appropriating revenue or moneys or imposing taxation shall originate only in the House of Assembly. But a Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(2) The Senate may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the services of the Government.

(3) The Senate may not amend any Bills so as to increase any proposed charges or burden on the people. 15, 223, 224.

<sup>1</sup> But see now Powers and Privileges of Parliament Act (Act No. 19 of 1911).

<sup>2</sup> See section 3 of the Statute of Westminster, 1931 (Appendix III), and section 2 of the Status of the Union Act, 1934 (Appendix VII).



**Appropriation Bills.**

61. Any Bill which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation. 224.

**Recommendation of Money Votes.**

62. The House of Assembly shall not originate or pass any vote, resolution, address, or Bill for the appropriation of any part of the public revenue or of any tax or impost to any purpose unless such appropriation has been recommended by message from the Governor-General during the session in which such vote, resolution, address, or Bill is proposed. 222, 224.

**Disagreements between the Two Houses.**

63. If the House of Assembly passes any Bill and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, and if the House of Assembly in the next session again passes the Bill with or without any amendments which have been made or agreed to by the Senate and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, the Governor-General may during that session convene a joint sitting of the members of the Senate and House of Assembly. The members present at any such joint sitting may deliberate and shall vote together upon the Bill as last proposed by the House of Assembly and upon amendments, if any, which have been made therein by one House of Parliament and not agreed to by the other; and any such amendments which are affirmed by a majority of the total number of members of the Senate and House of Assembly present at such sitting shall be taken to have been carried, and if the Bill with the amendments, if any, is affirmed by a majority of the members of the Senate and House of Assembly present at such sitting, it shall be taken to have been duly passed by both Houses of Parliament: Provided that, if the Senate shall reject or fail to pass any Bill dealing with the appropriation of revenue or moneys for the public service, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such Bill.

77, 183, 230, 232, 233, 237.

**Royal Assent to Bills.**

64.<sup>1</sup> When a Bill is presented to the Governor-General for the King's Assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from

<sup>1</sup> See section 8 of the Status of the Union Act, 1934 (Appendix VII), which abolishes the right of reserving bills for the King's pleasure.

time to time be given in that behalf by the King, that he assents in the King's name, or that he withholds assent, or that he reserves the Bill for the signification of the King's pleasure. All Bills repealing or amending this section or any of the provisions of Chapter IV under the heading 'House of Assembly', and all Bills abolishing provincial councils or abridging the powers conferred on provincial councils under section *eighty-five*, otherwise than in accordance with the provisions of that section, shall be so reserved. The Governor-General may return to the House in which it originated any Bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation.

77, 96, 134, 226, 243.

#### Disallowance of Bills.

65.<sup>1</sup> The King may disallow any law within one year after it has been assented to by the Governor-General, and such disallowance, on being made known by the Governor-General by speech or message to each of the Houses of Parliament or by proclamation, shall annul the law from the day when the disallowance is made known. 77, 96, 135, 243.

#### Reservation of Bills.

66.<sup>2</sup> A Bill reserved for the King's pleasure shall not have any force unless and until, within one year from the day on which it was presented to the Governor-General for the King's Assent, the Governor-General makes known by speech or message to each of the Houses of Parliament or by proclamation that it has received the King's Assent.

77, 96, 135, 243.

#### Signature and Enrolment of Acts.

67.<sup>3</sup> As soon as may be after any law shall have been assented to in the King's name by the Governor-General, or having been reserved for the King's pleasure shall have received his assent, the Clerk of the House of Assembly shall cause two fair copies of such law, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa; and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies thus deposited that signed by the Governor-General shall prevail.

244.

<sup>1</sup> See section 11 (2) of the Status of the Union Act, 1934 (Appendix VII).

<sup>2</sup> This section is repealed by section 11 (1) of the Status of the Union Act, 1934 (Appendix VII).

<sup>3</sup> Amended by section 9 of the Status of the Union Act, 1934 (Appendix VII). Act No. 8 of 1925 includes Afrikaans in the Dutch language.

## PART V

## THE PROVINCES

*Administrators***Appointment and Tenure of Office of Provincial Administrators.**

68. (1) In each province there shall be a chief executive officer appointed by the Governor-General-in-Council, who shall be styled the administrator of the province, and in whose name all executive acts relating to provincial affairs therein shall be done.

(2) In the appointment of the administrator of any province, the Governor-General-in-Council shall, as far as practicable, give preference to persons resident in such province.

(3) Such administrator shall hold office for a term of five years and shall not be removed before the expiration thereof except by the Governor-General-in-Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or, if Parliament be not sitting, then within one week after the commencement of the next ensuing session.

(4) The Governor-General-in-Council may from time to time appoint a deputy-administrator to execute the office and functions of the administrator during his absence, illness, or other inability.

77, 177, 315, 318, 346.

**Salaries of Administrators.**

69. The salaries of the administrators shall be fixed and provided by Parliament, and shall not be reduced during their respective terms of office.

315, 316.

*Provincial Councils***Constitution of Provincial Councils.**

70. (1) There shall be a provincial council in each province consisting of the same number of members as are elected in the province for the House of Assembly: Provided that, in any province whose representatives in the House of Assembly shall be less than twenty-five in number, the provincial council shall consist of twenty-five members.

(2) Any person qualified to vote for the election of members of the provincial council shall be qualified to be a member of such council.

77, 322.

**Qualification of Provincial Councillors.**

71.<sup>1</sup> (1) The members of the provincial council shall be elected by the persons qualified to vote for the election of members of the House

<sup>1</sup> See section 3 of Act No. 18 of 1930.

of Assembly in the province voting in the same electoral divisions as are delimited for the election of members of the House of Assembly: Provided that, in any province in which less than twenty-five members are elected to the House of Assembly, the delimitation of the electoral divisions, and any necessary re-allocation of members or adjustment of electoral divisions, shall be effected by the same commission and on the same principles as are prescribed in regard to the electoral divisions for the House of Assembly.

(2) Any alteration in the number of members of the provincial council, and any re-division of the province into electoral divisions, shall come into operation at the next general election for such council held after the completion of such re-division, or of any allocation consequent upon such alteration, and not earlier.

(3) The election shall take place at such times as the administrator shall by proclamation direct, and the provisions of section *thirty-seven* applicable to the election of members of the House of Assembly shall *mutatis mutandis* apply to such elections. 316, 322.

#### Application of Sections fifty-three to fifty-five to Provincial Councillors.

72.<sup>1</sup> The provisions of sections *fifty-three*, *fifty-four*, and *fifty-five*, relative to members of the House of Assembly shall *mutatis mutandis* apply to members of the provincial councils: Provided that any member of a provincial council who shall become a member of either House of Parliament shall thereupon cease to be a member of such provincial council. 77, 334.

#### Tenure of Office by Provincial Councillors.

73. Each provincial council shall continue for three years from the date of its first meeting, and shall not be subject to dissolution save by effluxion of time.

#### Sessions of Provincial Councils.

74. The administrator of each province shall by proclamation fix such times for holding the sessions of the provincial council as he may think fit, and may from time to time prorogue such council: Provided that there shall be a session of every provincial council once at least in every year, so that a period of twelve months shall not intervene between the last sitting of the council in one session and its first sitting in the next session. 316, 324.

#### Chairman of Provincial Councils.

75. The provincial council shall elect from among its members a chairman, and may make rules for the conduct of its proceedings.

<sup>1</sup> See section 37 of Act No. 12 of 1918; sections 27 and 51 of Act No. 11 of 1920.

Such rules shall be transmitted by the administrator to the Governor-General, and shall have full force and effect unless and until the Governor-General-in-Council shall express his disapproval thereof in writing addressed to the administrator. 325.

**Allowances of Provincial Councillors.**

76. The members of the provincial council shall receive such allowances as shall be determined by the Governor-General-in-Council. 324.

**Freedom of Speech in Provincial Councils.**

77. There shall be freedom of speech in the provincial council, and no member shall be liable to any action or proceeding in any court by reason of his speech or vote in such council. 325.

*Executive Committees*

**Provincial Executive Committees.**

78. (1) Each provincial council shall at its first meeting after any general election elect from among its members, or otherwise, four persons to form with the administrator, who shall be chairman, an executive committee for the province. The members of the executive committee other than the administrator shall hold office until the election of their successors in the same manner.

(2) Such members shall receive such remuneration as the provincial council, with the approval of the Governor-General-in-Council, shall determine.

(3) A member of the provincial council shall not be disqualified from sitting as a member by reason of his having been elected as a member of the executive committee.

(4) Any casual vacancy arising in the executive committee shall be filled by election by the provincial council if then in session, or, if the council is not in session, by a person appointed by the executive committee to hold office temporarily pending an election by the council. 77, 319, 346.

**Right of Administrator, &c., to Take Part in Proceedings of Provincial Council.**

79. The administrator and any other member of the executive committee of a province, not being a member of the provincial council, shall have the right to take part in the proceedings of the council, but shall not have the right to vote. 77, 316, 320.

**Powers of Provincial Executive Committees.**

80. The executive committee shall on behalf of the provincial council carry on the administration of provincial affairs. Until the first election of members to serve on the executive committee, such

administration shall be carried on by the administrator. Whenever there are not sufficient members of the executive committee to form a quorum according to the rules of the committee, the administrator shall, as soon as practicable, convene a meeting of the provincial council for the purpose of electing members to fill the vacancies, and until such election the administrator shall carry on the administration of provincial affairs. 77, 320, 346.

#### **Transfer of Powers to Provincial Executive Committees.**

81.<sup>1</sup> Subject to the provisions of this Act, all powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in or exercised by the Governor or the Governor-in-Council, or any Minister of the Colony, shall after such establishment be vested in the executive committee of the province so far as such powers, authorities, and functions relate to matters in respect of which the provincial council is competent to make ordinances. 77, 274, 320.

#### **Voting in Executive Committees.**

82. Questions arising in the executive committee shall be determined by a majority of votes of the members present, and, in case of an equality of votes, the administrator shall have also a casting vote. Subject to the approval of the Governor-General-in-Council, the executive committee may make rules for the conduct of its proceedings. 77, 316, 320.

#### **Tenure of Office of Members of Executive Committees.**

83.<sup>2</sup> Subject to the provisions of any law passed by Parliament regulating the conditions of appointment, tenure of office, retirement, and superannuation of public officers, the executive committee shall have power to appoint such officers as may be necessary, in addition to officers assigned to the province by the Governor-General-in-Council under the provisions of this Act, to carry out the services entrusted to them and to make and enforce regulations for the organization and discipline of such officers. 321.

#### **Power of Administrator to Act on behalf of Governor-General-in-Council.**

84. In regard to all matters in respect of which no powers are reserved or delegated to the provincial council, the administrator shall act on behalf of the Governor-General-in-Council when required to do so, and in such matters the administrator may act without reference to the other members of the executive committee. 77, 317.

<sup>1</sup> See section 11 of Act No. 10 of 1913; section 9 of Act No. 46 of 1925; section 1 of Act No. 39 of 1927; section 3 of Act No. 21 of 1928.

<sup>2</sup> See Act No. 27 of 1923; section 1 of Act No. 29 of 1912.

*Powers of Provincial Councils***Powers of Provincial Councils.**

85.<sup>1</sup> Subject to the provisions of this Act and the assent of the Governor-General-in-Council as hereinafter provided, the provincial council may make ordinances in relation to matters coming within the following classes of subjects (that is to say):—

77, 86, 96, 97, 260, 261, 262, 264, 268, 272, 274, 346.

- (i)<sup>2</sup> Direct taxation within the province in order to raise a revenue for provincial purposes: 273-281.
- (ii) The borrowing of money on the sole credit of the province with the consent of the Governor-General-in-Council and in accordance with regulations to be framed by Parliament: 281.
- (iii)<sup>3</sup> Education, other than higher education, for a period of five years and thereafter until Parliament otherwise provides: 277, 287.
- (iv) Agriculture to the extent and subject to the conditions to be defined by Parliament: 290.
- (v) The establishment, maintenance, and management of hospitals and charitable institutions: 290.
- (vi)<sup>4</sup> Municipal institutions, divisional councils, and other local institutions *having authority and functions in any area in respect of the local government of, or the preservation of public health in, that area, including any such body as is referred to in section seven of the Public Health Act, 1919 (Act No. 36 of 1919).* 265, 291.
- (vii) Local works and undertakings within the province, other than railways and harbours, and other than such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work and to provide for its construction by arrangement with the provincial council or otherwise: 301.

<sup>1</sup> See section 9 of Act No. 46 of 1925; section 11 of Act No. 10 of 1913; section 3 of Act No. 39 of 1927; section 3 of Act No. 21 of 1928. See also Acts Nos. 9 of 1917; 6 of 1920; 4 of 1920 (section 2); 5 of 1922; and 31 of 1928.

<sup>2</sup> Amended by section 3 of Act No. 5 of 1921; section 9 of Act No. 5 of 1922; see section 11 of Act No. 10 of 1913; section 9 of Act No. 46 of 1925; Act No. 39 of 1927; section 3 of Act No. 21 of 1928.

<sup>3</sup> 'Higher education' is defined in section 11 of Act No. 5 of 1922; see section 14 of Act No. 46 of 1925; Act No. 29 of 1928.

<sup>4</sup> As amended by section 1 (1) of Act No. 1 of 1926; in operation since January 1, 1920, but not with reference to the Natal Ordinances referred to in section 2 of that act.

- (viii) Roads, outspans, ponts, and bridges, other than bridges connecting two provinces: 302.
- (ix) Markets and pounds: 303.
- (x) Fish and game preservation:<sup>1</sup> 304.
- (xi) The imposition of punishment by fine, penalty, or imprisonment for enforcing any law or any ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section: 305.
- (xii) Generally all matters which, in the opinion of the Governor-General-in-Council, are of a merely local or private nature in the province: 65, 306.
- (xiii)<sup>2</sup> All other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council. 307, 309.

#### Effect of Provincial Ordinances.

86. Any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any Act of Parliament. 78, 97, 263, 264, 268, 270.

#### Recommendations to Parliament.

87. A provincial council may recommend to Parliament the passing of any law relating to any matter in respect of which such council is not competent to make ordinances. 346.

#### Power to Deal with Matters Proper to be Dealt with by Private Bill Legislation.

88.<sup>3</sup> In regard to any matter which requires to be dealt with by means of a private Act of Parliament, the provincial council of the province to which the matter relates may, subject to such procedure as shall be laid down by Parliament, take evidence by means of a Select Committee or otherwise for and against the passing of such law, and, upon receipt of a report from such council, together with the evidence upon which it is founded, Parliament may pass such Act without further evidence being taken in support thereof. 228, 327.

#### Constitution of Provincial Revenue Fund.

89.<sup>4</sup> A provincial revenue fund shall be formed in every province, into which shall be paid all revenues raised by or accruing to the provincial council and all moneys paid over by the Governor-General-in-Council to the provincial council. Such fund shall be

<sup>1</sup> As to National Parks see section 3 of Act No. 56 of 1926.

<sup>2</sup> See Act No. 10 of 1913 and its amendments.

<sup>3</sup> See section 5 of Act No. 20 of 1912.

<sup>4</sup> See section 17 of Act No. 10 of 1913 for administrator's powers in regard to unforeseen expenditure.



appropriated by the provincial council by ordinance for the purposes of the provincial administration generally, or, in the case of moneys paid over by the Governor-General-in-Council for particular purposes, then for such purposes, but no such ordinance shall be passed by the provincial council unless the administrator shall have first recommended to the council to make provision for the specific service for which the appropriation is to be made. No money shall be issued from the provincial revenue fund except in accordance with such appropriation and under warrant signed by the administrator: Provided that, until the expiration of one month after the first meeting of the provincial council, the administrator may expend such moneys as may be necessary for the services of the province. 282, 316.

#### Assent to Provincial Ordinances.

90. When a proposed ordinance has been passed by a provincial council it shall be presented by the administrator to the Governor-General-in-Council for his assent. The Governor-General-in-Council shall declare within one month from the presentation to him of the proposed ordinance that he assents thereto, or that he withholds assent, or that he reserves the proposed ordinance for further consideration. A proposed ordinance so reserved shall not have any force unless and until, within one year from the day on which it was presented to the Governor-General-in-Council, he makes known by proclamation that it has received his assent. 78, 269, 319.

#### Effect and Enrolment of Ordinances.

91. An ordinance assented to by the Governor-General-in-Council and promulgated by the administrator shall, subject to the provisions of this Act, have the force of law within the province. The administrator shall cause two fair copies of every such ordinance, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa; and such copies shall be conclusive evidence as to the provisions of such ordinance, and, in case of conflict between the two copies thus deposited, that signed by the Governor-General shall prevail. 78, 97, 269, 316.

#### *Miscellaneous*

#### Audit of Provincial Accounts.

92. (1) In each province there shall be an auditor of accounts to be appointed by the Governor-General-in-Council.

(2) No such auditor shall be removed from office except by the Governor-General-in-Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one

week after the removal if Parliament be then sitting, and, if Parliament be not sitting, then within one week after the commencement of the next ensuing session.

(3) Each such auditor shall receive out of the Consolidated Revenue Fund such salary as the Governor-General-in-Council, with the approval of Parliament, shall determine.

(4) Each such auditor shall examine and audit the accounts of the province to which he is assigned subject to such regulations and orders as may be framed by the Governor-General-in-Council and approved by Parliament, and no warrant signed by the administrator authorizing the issuing of money shall have effect unless countersigned by such auditor.

283, 321.

#### Continuation of Powers of Divisional and Municipal Councils.

93. Notwithstanding anything in this Act contained, all powers, authorities, and functions lawfully exercised at the establishment of the Union by divisional or municipal councils, or any other duly constituted local authority, shall be and remain in force until varied or withdrawn by Parliament or by a provincial council having power in that behalf.

42.

#### Seats of Provincial Government.

94. The seats of provincial government shall be—

For the Cape of Good Hope . . . . .	Capetown.
For Natal . . . . .	Pietermaritzburg.
For the Transvaal . . . . .	Pretoria.
For the Orange Free State . . . . .	Bloemfontein.

324.

### PART VI<sup>1</sup>

#### THE SUPREME COURT OF SOUTH AFRICA

##### Constitution of Supreme Court.

95.<sup>2</sup> There shall be a Supreme Court of South Africa consisting of a Chief Justice of South Africa, the judges of appeal, and the other judges of the several divisions of the Supreme Court of South Africa in the provinces.

108, 357.

##### Appellate Division of Supreme Court.

96.<sup>3</sup> *There shall be an appellate division of the Supreme Court of South Africa consisting of the chief justice of South Africa and four judges of appeal.*

78, 357.

<sup>1</sup> See section 2 of Act No. 11 of 1927.

<sup>2</sup> As amended by section 2 (1) (a) of Act No. 12 of 1920.

<sup>3</sup> As substituted by section 1 of Act No. 12 of 1920.

**Filling of Temporary Vacancies in Appellate Division.**

97.<sup>1</sup> The Governor-General-in-Council may, during the absence, illness, or other incapacity of the Chief Justice of South Africa, or of any judge of appeal, appoint any other judge of the Supreme Court of South Africa to act temporarily as such chief justice, or judge of appeal, as the case may be. 109.

**Constitution of Provincial and Local Divisions of Supreme Court.**

98. (1) The several supreme courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony shall, on the establishment of the Union, become provincial divisions of the Supreme Court of South Africa within their respective provinces, and shall each be presided over by a judge-president.

(2) The court of the eastern districts of the Cape of Good Hope, the High Court of Griqualand, the High Court of Witwatersrand, and the several circuit courts, shall become local divisions of the Supreme Court of South Africa within the respective areas of their jurisdiction as existing at the establishment of the Union.

(3) The said provincial and local divisions, referred to in this Act as superior courts, shall, in addition to any original jurisdiction exercised by the corresponding courts of the Colonies at the establishment of the Union, have jurisdiction in all matters—

(a) in which the Government of the Union or a person suing or being sued on behalf of such Government is a party:

(b) in which the validity of any provincial ordinance shall come into question.

(4)<sup>2</sup> Unless and until Parliament shall otherwise provide, the said superior courts shall *mutatis mutandis* have the same jurisdiction in matters affecting the validity of elections of members of the House of Assembly and provincial councils as the corresponding courts of the Colonies have at the establishment of the Union in regard to parliamentary elections in such Colonies respectively. 42, 78, 357.

**Continuation in Office of Existing Judges.**

99. All judges of the superior courts of the Colonies, including the High Court of the Orange River Colony, holding office at the establishment of the Union shall on such establishment become judges of the Supreme Court of South Africa, assigned to the divisions of the Supreme Court in the respective provinces, and shall retain all such rights in regard to salaries and pensions as they may possess at the establishment of the Union. The Chief Justices of the Colonies holding office at the establishment of the Union shall on such establishment

<sup>1</sup> As amended by section 2 (1) (b) of Act No. 12 of 1920.

<sup>2</sup> See sections 106-33 of Act No. 12 of 1918.

become the Judges-President of the divisions of the Supreme Court in the respective provinces, but shall so long as they hold that office retain the title of Chief Justice of their respective provinces. 42, 78, 377.

#### Appointment and Remuneration of Judges.

100.<sup>1</sup> The Chief Justice of South Africa, the judges of appeal, and all other judges of the Supreme Court of South Africa to be appointed after the establishment of the Union, shall be appointed by the Governor-General-in-Council, and shall receive such remuneration as Parliament shall prescribe, and their remuneration shall not be diminished during their continuance in office. 76, 78, 377.

#### Tenure of Office by Judges.

101. The Chief Justice of South Africa and other judges of the Supreme Court of South Africa shall not be removed from office except by the Governor-General-in-Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity. 78, 377.

#### Reduction in Number of Judges.

102. Upon any vacancy occurring in any division of the Supreme Court of South Africa, other than the Appellate Division, the Governor-General-in-Council may, in case he shall consider that the number of judges of such court may with advantage to the public interests be reduced, postpone filling the vacancy until Parliament shall have determined whether such reduction shall take place. 377.

#### Appeals to Appellate Division.

103.<sup>2</sup> In every civil case in which, according to the law in force at the establishment of the Union, an appeal might have been made to the Supreme Court of any of the Colonies from a superior court in any of the Colonies, or from the *High Court of Southern Rhodesia*, the appeal shall be made only to the Appellate Division, except in cases of orders or judgments given by a single judge, upon applications by way of motion or petition or on summons for provisional sentence or judgments as to costs only, which by law are left to the discretion of the court. The appeal from any such orders or judgments, as well as any appeal in criminal cases from any such superior court, or the special reference by any such court of any point of law in a criminal case, shall be made to the provincial division

<sup>1</sup> As amended by section 2 (1) (c) of Act No. 12 of 1920.

<sup>2</sup> See Appellate Division Further Jurisdiction Act, 1911 (Act No. 1 of 1911). See section 3 of Act No. 12 of 1920 regarding appeals from S.W.A., and Act No. 18 of 1931 regarding appeals from Southern Rhodesia. See Act No. 31 of 1917, sections 308-72; Act No. 11 of 1927. The words in italics were deleted by section 7 (2) of Act No. 18 of 1931.

corresponding to the court which before the establishment of the Union would have had jurisdiction in the matter. There shall be no further appeal against any judgment given on appeal by such provincial division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal. 78, 108.

#### Existing Appeals.

104. In every case, civil or criminal, in which at the establishment of the Union an appeal might have been made from the Supreme Court of any of the Colonies or from the High Court of the Orange River Colony to the King-in-Council, the appeal shall be made only to the Appellate Division: Provided that the right of appeal in any civil suit shall not be limited by reason only of the value of the matter in dispute or the amount claimed or awarded in such suit.

#### Appeals from Inferior Courts to Provincial Divisions.

105. In every case, civil or criminal, in which at the establishment of the Union an appeal might have been made from a court of resident magistrate or other inferior court to a superior court in any of the Colonies, the appeal shall be made to the corresponding division of the Supreme Court of South Africa; but there shall be no further appeal against any judgment given on appeal by such division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal. 360, 363.

#### Provisions as to Appeals to the King-in-Council.

106. There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King-in-Council, but nothing herein contained shall be construed to impair any right which the King-in-Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King-in-Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure:<sup>1</sup> Provided that nothing in this section shall affect any right of appeal to His Majesty-in-Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890. 78, 134, 136, 244, 375, 376.

#### Rules of Procedure in Appellate Division.

107.<sup>2</sup> The Chief Justice of South Africa and the judges of appeal may, subject to the approval of the Governor-General-in-Council,

<sup>1</sup> Cf. paragraph vii of the Royal Instructions (Appendix VI). See section 9 of the Royal Executive Functions and Seals Act, 1934 (Appendix VIII).

<sup>2</sup> As amended by section 2 (1) (d) of Act No. 12 of 1920.

make rules for the conduct of the proceedings of the Appellate Division and prescribing the time and manner of making appeals thereto. Until such rules shall have been promulgated, the rules in force in the Supreme Court of the Cape of Good Hope at the establishment of the Union shall *mutatis mutandis* apply.

#### Rules of Procedure in Provincial and Local Divisions.

108. The Chief Justice and other judges of the Supreme Court of South Africa may, subject to the approval of the Governor-General-in-Council, frame rules for the conduct of the proceedings of the several provincial and local divisions. Until such rules shall have been promulgated, the rules in force at the establishment of the Union in the respective courts which become divisions of the Supreme Court of South Africa shall continue to apply therein.

#### Place of Sittings of Appellate Division.

109.<sup>1</sup> The Appellate Division shall sit in Bloemfontein, but may from time to time for the convenience of suitors hold its sittings at other places within the Union. 78, 108, 361.

#### Quorum for Hearing Appeals.

110.<sup>2</sup> (1) *On the hearing of an appeal from a court consisting of a single judge, three judges of the Appellate Division shall form a quorum; and on the hearing of an appeal from a court consisting of two or more judges, four judges of the Appellate Division shall form a quorum:*

*Provided that if four judges of the Appellate Division sit to hear an appeal and are equally divided as to any judgment or order, or part thereof, to be given on appeal, any part of the judgment or order of the court from which the appeal is made, in respect whereof such judges are so divided, shall stand and shall be deemed to be the judgment or order of the Appellate Division:*

*Provided, further, that the costs arising out of any matter in respect whereof such judges are so divided shall be awarded to the party in whose favour such matter was decided by the court from which the appeal is made, subject to the power of such judges, or three of them, to make any other order as to the costs which they may deem equitable.*

(2) *If after argument on an appeal has been heard a judge who sat at the hearing dies or retires, or becomes otherwise incapable of acting before judgment has been given on the appeal, then—*

(a) *if the argument was heard before three judges, the judgments of the two remaining judges if in agreement; or*

<sup>1</sup> See section 16 of Act No. 27 of 1912 for interpretation hereof.

<sup>2</sup> As substituted by section 1 of Act No. 11 of 1927.

- (b) *if the argument was heard before four judges, the judgments of the three remaining judges if in agreement; or*
- (c) *if the argument was heard before five judges, the judgments of the four remaining judges if in agreement, or of any three of them which are in agreement,*

*shall be the judgment of the Court.*

(3) *No judge shall sit in the hearing of an appeal against a judgment or order given in a case which was heard before him.* 360.

#### **Jurisdiction of Appellate Division.**

111. The process of the Appellate Division shall run throughout the Union, and all its judgments or orders shall have full force and effect in every province and shall be executed in like manner as if they were original judgments or orders of the provincial division of the Supreme Court of South Africa in such province. 362.

#### **Execution of Processes of Provincial Divisions.**

112.<sup>1</sup> The registrar of every provincial division of the Supreme Court of South Africa, if thereto requested by any party in whose favour any judgment or order has been given or made by any other division, shall, upon the deposit with him of an authenticated copy of such judgment or order and on proof that the same remains unsatisfied, issue a writ or other process for the execution of such judgment or order, and thereupon such writ or other process shall be executed in like manner, as if it had been originally issued from the division of which he is registrar. 369.

#### **Transfer of Suits from one Provincial or Local Division to Another.**

113.<sup>2</sup> Any provincial or local division of the Supreme Court of South Africa to which it may be made to appear that any civil suit pending therein may be more conveniently or fitly heard or determined in another division, may order the same to be removed to such other division, and thereupon such last-mentioned division may proceed with such suit in like manner as if it had been originally commenced therein. 369.

#### **Registrar and Officers of Appellate Division.**

114. The Governor-General-in-Council may appoint a registrar of the Appellate Division and such other officers thereof as shall be required for the proper dispatch of the business thereof.

<sup>1</sup> See section 5 (1) of Act No. 24 of 1922 for application of this section to mandated territory of S.W.A.

<sup>2</sup> See section 14 of Act No. 27 of 1912 in civil, and section 141 of Act No. 31 of 1917 in criminal matters. As to S.W.A. see Act No. 24 of 1922.



**Advocates and Attorneys.**

115. (1) The laws regulating the admission of advocates and attorneys to practise before any superior court of any of the Colonies shall *mutatis mutandis* apply to the admission of advocates and attorneys to practise in the corresponding division of the Supreme Court of South Africa.

(2) All advocates and attorneys entitled at the establishment of the Union to practise in any superior court of any of the Colonies shall be entitled to practise as such in the corresponding division of the Supreme Court of South Africa.

(3) All advocates and attorneys entitled to practise before any provincial division of the Supreme Court of South Africa shall be entitled to practise before the Appellate Division. 354, 382.

**Pending Suits.**

116. All suits, civil or criminal, pending in any superior court of any of the Colonies at the establishment of the Union shall stand removed to the corresponding division of the Supreme Court of South Africa, which shall have jurisdiction to hear and determine the same, and all judgments and orders of any superior court of any of the Colonies given or made before the establishment of the Union shall have the same force and effect as if they had been given or made by the corresponding division of the Supreme Court of South Africa. All appeals to the King-in-Council which shall be pending at the establishment of the Union shall be proceeded with as if this Act had not been passed.

**PART VII****FINANCE AND RAILWAYS****Constitution of Consolidated Revenue Fund and Railway and Harbour Fund.**

117.<sup>1</sup> All revenues, from whatever source arising, over which the several Colonies have at the establishment of the Union power of appropriation, shall vest in the Governor-General-in-Council. There shall be formed a Railway and Harbour Fund, into which shall be paid all revenues raised or received by the Governor-General-in-Council from the administration of the railways, ports, and harbours, and such fund shall be appropriated by Parliament to the purposes of the railways, ports, and harbours in the manner prescribed by this Act. There shall also be formed a Consolidated Revenue Fund,

<sup>1</sup> See section 4 (3) of Act No. 33 of 1922 about defence endowment account. See Act No. 20 of 1922, as to S.W.A. See Act No. 5 of 1926, as to provision of a General Sinking Fund.



into which shall be paid all other revenues raised or received by the Governor-General-in-Council, and such fund shall be appropriated by Parliament for the purposes of the Union in the manner prescribed by this Act, and subject to the charges imposed thereby. 78, 158.

**Commission of Inquiry into Financial Relations between Union and Provinces.**

118.<sup>1</sup> The Governor-General-in-Council shall, as soon as may be after the establishment of the Union, appoint a commission, consisting of one representative from each province, and presided over by an officer from the Imperial Service, to institute an inquiry into the financial relations which should exist between the Union and the provinces. Pending the completion of that inquiry and until Parliament otherwise provides, there shall be paid annually out of the Consolidated Revenue Fund to the administrator of each province—

- (a) an amount equal to the sum provided in the estimates for education, other than higher education, in respect of the financial year, 1908-9, as voted by the Legislature of the corresponding colony during the year nineteen hundred and eight;
- (b) such further sums as the Governor-General-in-Council may consider necessary for the due performance of the services and duties assigned to the provinces respectively.

Until such inquiry shall be completed and Parliament shall have made other provisions, the executive committees in the several provinces shall annually submit estimates of their expenditure for the approval of the Governor-General-in-Council, and no expenditure shall be incurred by any executive committee which is not provided for in such approved estimates. 72, 274, 283.

**Security for Existing Public Debts.**

119. The annual interest of the public debts of the Colonies and any sinking funds constituted by law at the establishment of the Union shall form a first charge on the Consolidated Revenue Fund. 42, 157.

**Requirements for Withdrawal of Money from Funds.**

120. No money shall be withdrawn from the Consolidated Revenue Fund or the Railway and Harbour Fund except under appropriation made by law. But, until the expiration of two months after the first meeting of Parliament the Governor-General-in-Council may draw therefrom and expend such moneys as may be necessary for the public service, and for railway and harbour administration respectively. 78, 158, 223.

<sup>1</sup> See Act No. 10 of 1913.

**Transfer of Colonial Property to the Union.**

121. All stocks, cash, bankers' balances, and securities for money belonging to each of the Colonies at the establishment of the Union shall be the property of the Union: Provided that the balances of any funds raised at the establishment of the Union by law for any special purposes in any of the Colonies shall be deemed to have been appropriated by Parliament for the special purposes for which they have been provided. 42, 78.

**Crown Lands, &c.**

122. Crown lands, public works, and all property throughout the Union, movable or immovable, and all rights of whatever description belonging to the several Colonies at the establishment of the Union, shall vest in the Governor-General-in-Council subject to any debt or liability specifically charged thereon. 42.

**Mines and Minerals.**

123.<sup>1</sup> All rights in and to mines and minerals, and all rights in connection with the searching for, working for, or disposing of, minerals (or precious stones), which at the establishment of the Union are vested in the Government of any of the Colonies, shall on such establishment vest in the Governor-General-in-Council. 42.

**Assumption by Union of Colonial Debts.**

124. The Union shall assume all debts and liabilities of the Colonies existing at its establishment, subject, notwithstanding any other provision contained in this Act, to the conditions imposed by any law under which such debts or liabilities were raised or incurred, and without prejudice to any rights of security or priority in respect of the payment of principal, interest, sinking fund, and other charges conferred on the creditors of any of the Colonies, and may, subject to such conditions and rights, convert, renew, or consolidate such debts. 42, 78.

**Ports, Harbours, and Railways.**

125. All ports, harbours, and railways belonging to the several Colonies at the establishment of the Union shall from the date thereof vest in the Governor-General-in-Council. No railway for the conveyance of public traffic, and no port, harbour, or similar work, shall be constructed without the sanction of Parliament. 42, 153.

**Constitution of Harbour and Railway Board.**

126.<sup>2</sup> Subject to the authority of the Governor-General-in-Council, the control and management of the railways, ports, and harbours of

<sup>1</sup> See section 1 of Act No. 44 of 1927 regarding precious stones.

<sup>2</sup> See Act No. 13 of 1915; and Act No. 17 of 1916.

the Union shall be exercised through a board consisting of not more than three commissioners, who shall be appointed by the Governor-General-in-Council, and a minister of State, who shall be chairman. Each commissioner shall hold office for a period of five years, but may be re-appointed. He shall not be removed before the expiration of his period of appointment, except by the Governor-General-in-Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or, if Parliament be not sitting, then within one week after the commencement of the next ensuing session. The salaries of the commissioners shall be fixed by Parliament and shall not be reduced during their respective terms of office.

78, 153.

#### Administration of Railways, Ports, and Harbours.

127.<sup>1</sup> The railways, ports, and harbours of the Union shall be administered on business principles, due regard being had to agricultural and industrial development within the Union and promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union. So far as may be, the total earnings shall be not more than are sufficient to meet the necessary outlays for working maintenance, betterment, depreciation, and the payment of interest due on capital not being capital contributed out of railway or harbour revenue, and not including any sums payable out of the Consolidated Revenue Fund in accordance with the provisions of sections *one hundred and thirty* and *one hundred and thirty-one*. The amount of interest due on such capital invested shall be paid over from the Railway and Harbour Fund into the Consolidated Revenue Fund. The Governor-General-in-Council shall give effect to the provisions of this section as soon as and at such time as the necessary administrative and financial arrangements can be made, but in any case shall give full effect to them before the expiration of four years from the establishment of the Union. During such period, if the revenues accruing to the Consolidated Revenue Fund are insufficient to provide for the general service of the Union, and if the earnings accruing to the Railway and Harbour Fund are in excess of the outlays specified herein, Parliament may by law appropriate such excess or any part thereof towards the general expenditure of the Union, and all sums so appropriated shall be paid over to the Consolidated Revenue Fund.

78, 153, 154.

<sup>1</sup> Administration now governed by Act No. 22 of 1910, as amended.

**Establishment of Fund for Maintaining Uniformity of Railway Rates.**

128.<sup>1</sup> Notwithstanding anything to the contrary in the last preceding section, the Board may establish a fund out of railway and harbour revenue to be used for maintaining, as far as may be, uniformity of rates notwithstanding fluctuations in traffic. 153.

**Management of Railway and Harbour Balances.**

129. All balances standing to the credit of any fund established in any of the Colonies for railway or harbour purposes at the establishment of the Union shall be under the sole control and management of the Board, and shall be deemed to have been appropriated by Parliament for the respective purposes for which they have been provided. 153.

**Construction of Harbour and Railway Works.**

130.<sup>2</sup> Every proposal for the construction of any port or harbour works or of any line of railway, before being submitted to Parliament, shall be considered by the Board, which shall report thereon, and shall advise whether the proposed works or line of railway should or should not be constructed. If any such works or line shall be constructed contrary to the advice of the Board, and if the Board is of opinion that the revenue derived from the operation of such works or line will be insufficient to meet the costs of working and maintenance, and of interest on the capital invested therein, it shall frame an estimate of the annual loss which, in its opinion, will result from such operation. Such estimate shall be examined by the Controller and Auditor-General, and when approved by him the amount thereof shall be paid over annually from the Consolidated Revenue Fund to the Railway and Harbour Fund: Provided that, if in any year the actual loss incurred, as calculated by the Board and certified by the Controller and Auditor-General, is less than the estimate framed by the Board, the amount paid over in respect of that year shall be reduced accordingly so as not to exceed the actual loss incurred. In calculating the loss arising from the operation of any such work or line, the Board shall have regard to the value of any contributions of traffic to other parts of the system which may be due to the operation of such work or line.

**Making Good of Deficiencies in Railway Fund in Certain Cases.**

131.<sup>3</sup> If the Board shall be required by the Governor-General in-

<sup>1</sup> See section 3 of Act No. 17 of 1916 for requirements of report.

<sup>2</sup> See also section 56 of Act No. 21 of 1911; section 17 of Act No. 31 of 1916; section 3 (2) of Act No. 17 of 1916; and for application to South-West Africa, section 7 of Act No. 20 of 1922.

<sup>3</sup> See section 56 of Act No. 21 of 1911; section 17 of Act No. 31 of 1916.

Council or under any Act of Parliament or resolution of both Houses of Parliament to provide any services or facilities either gratuitously or at a rate of charge which is insufficient to meet the costs involved in the provision of such services or facilities, the Board shall at the end of each financial year present to Parliament an account approved by the Controller and Auditor-General, showing, as nearly as can be ascertained, the amount of the loss incurred by reason of the provision of such services and facilities, and such amount shall be paid out of the Consolidated Revenue Fund to the Railway and Harbour Fund. 157.

#### **Controller and Auditor-General.**

132. The Governor-General in Council shall appoint a Controller and Auditor-General who shall hold office during good behaviour: provided that he shall be removed by the Governor-General in Council on an address praying for such removal presented to the Governor-General by both Houses of Parliament: provided further that when Parliament is not in session the Governor-General in Council may suspend such officer on the ground of incompetence or misbehaviour; and, when and so often as such suspension shall take place, a full statement of the circumstances shall be laid before both Houses of Parliament within fourteen days after the commencement of its next session; and, if an address shall at any time during the session of Parliament be presented to the Governor-General by both Houses praying for the restoration to office of such officer, he shall be restored accordingly; and if no such address be presented the Governor-General shall confirm such suspension and shall declare the office of Controller and Auditor-General to be, and it shall thereupon become, vacant. Until Parliament shall otherwise provide, the Controller and Auditor-General shall exercise such powers and functions and undertake such duties as may be assigned to him by the Governor-General in Council by regulations framed in that behalf. (*Repealed by section one, Act No. 21 of 1911.*) 108, 157.

#### **Compensation of Colonial Capitals for Diminution of Prosperity.**

133. In order to compensate Pietermaritzburg and Bloemfontein for any loss sustained by them in the form or diminution of prosperity or decreased rateable value by reason of their ceasing to be seats of government of their respective Colonies, there shall be paid from the Consolidated Revenue Fund for a period not exceeding twenty-five years to the municipal councils of such towns a grant of two per centum per annum on their municipal debts, as existing on the thirty-first day of January nineteen hundred and nine, and as ascertained by the Controller and Auditor-General. The Commission appointed under section one hundred and eighteen shall, after due inquiry, report

to the Governor-General-in-Council what compensation should be paid to the municipal councils of Capetown and Pretoria for the losses, if any, similarly sustained by them. Such compensation shall be paid out of the Consolidated Revenue Fund for a period not exceeding twenty-five years, and shall not exceed one per centum per annum on the respective municipal debts of such towns existing on the thirty-first January nineteen hundred and nine, and as ascertained by the Controller and Auditor-General. For the purposes of this section Capetown shall be deemed to include the municipalities of Capetown, Green Point and Sea Point, Woodstock, Mowbray and Rondebosch, Claremont, and Wynberg, and any grant made to Capetown shall be payable to the councils of such municipalities in proportion to their respective debts. One half of any such grants shall be applied to the redemption of the municipal debts of such towns respectively. At any time after the tenth annual grant has been paid to any of such towns the Governor-General-in-Council, with the approval of Parliament, may after due inquiry withdraw or reduce the grant to such town.

#### PART VIII

##### GENERAL

##### Method of Voting for Senators, &c.

134. The election of senators and of members of the executive committees of the provincial councils as provided in this Act shall, whenever such election is contested, be according to the principle of proportional representation, each voter having one transferable vote. The Governor-General-in-Council, or, in the case of the first election of the Senate, the Governor-in-Council of each of the Colonies, shall frame regulations prescribing the method of voting and of transferring and counting votes and the duties of returning officers in connection therewith, and such regulations or any amendments thereof after being duly promulgated shall have full force and effect unless and until Parliament shall otherwise provide. 189, 319.

##### Continuation of Existing Colonial Laws.

135. Subject to the provisions of this Act, all laws in force in the several Colonies at the establishment of the Union shall continue in force in the respective provinces until repealed or amended by Parliament, or by the provincial councils in matters in respect of which the power to make ordinances is reserved or delegated to them. All legal commissions in the several Colonies at the establishment of the Union shall continue as if the Union had not been established.

**Free Trade throughout the Union.**

136. There shall be free trade throughout the Union, but until Parliament otherwise provides the duties of custom and of excise leviable under the laws existing in any of the Colonies at the establishment of the Union shall remain in force. 79.

**Equality of English and Dutch Languages.**

137.<sup>1</sup> Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages. 100, 111.

**Naturalization.**

138. All persons who have been naturalized in any of the Colonies shall be deemed to be naturalized throughout the Union. 42.

**Administration of Justice.**

139.<sup>2</sup> The administration of justice throughout the Union shall be under the control of the Minister of State, in whom shall be vested all powers, authorities, and functions which shall at the establishment of the Union be vested in the Attorneys-General of the Colonies. 108, 379.

**Existing Officers.**

140.<sup>3</sup> Subject to the provisions of the next succeeding section, all officers of the public service of the Colonies shall at the establishment of the Union become officers of the Union. 78.

**Reorganization of Public Departments.**

141. (1) As soon as possible after the establishment of the Union, the Governor-General-in-Council shall appoint a public service commission to make recommendations for such reorganization and readjustment of the departments of the public service as may be necessary. The commission shall also make recommendations in regard to the assignment of officers to the several provinces.

(2) The Governor-General-in-Council may after such commission has reported assign from time to time to each province such officers as may be necessary for the proper discharge of the services reserved or delegated to it, and such officers on being so assigned shall become officers of the province. Pending the assignment of such officers,

<sup>1</sup> See section 1 of Act No. 8 of 1925, regarding Afrikaans.

<sup>2</sup> As amended by section 1 (1) of Act No. 39 of 1920.

<sup>3</sup> See section 59 of Act No. 29 of 1912; sections 9, 10 of Act No. 39 of 1914.



the Governor-General-in-Council may place at the disposal of the provinces the services of such officers of the Union as may be necessary.

(3) The provisions of this section shall not apply to any service or department under the control of the Railway and Harbour Board, or to any person holding office under the Board.

#### **Public Service Commission.**

142.<sup>1</sup> After the establishment of the Union the Governor-General-in-Council shall appoint a permanent public service commission with such powers and duties relating to the appointment, discipline, retirement, and superannuation of public officers as Parliament shall determine.

108, 149.

#### **Pensions of Existing Officers.**

143. Any officer of the public service of any of the Colonies at the establishment of the Union who is not retained in the service of the Union or assigned to that of a province shall be entitled to receive such pension, gratuity, or other compensation as he would have received in like circumstances if the Union had not been established.

78, 152.

#### **Tenure of Office of Existing Officers.**

144. Any officer of the public service of any of the Colonies at the establishment of the Union who is retained in the service of the Union or assigned to that of a province shall retain all his existing and accruing rights, and shall be entitled to retire from the service at the time at which he would have been entitled by law to retire, and on the pension or retiring allowance to which he would have been entitled by law in like circumstances if the Union had not been established.

148.

#### **Existing Officers not to be Dismissed for Ignorance of English or Dutch.**

145. The services of officers in the public service of any of the Colonies at the establishment of the Union shall not be dispensed with by reason of their want of knowledge of either the English or Dutch language.

148.

#### **Compensation to Existing Officers Who are Not Retained.**

146. Any permanent officer of the Legislature of any of the Colonies who is not retained in the service of the Union, or assigned to that of any province, and for whom no provision shall have been made by such Legislature, shall be entitled to such pension, gratuity, or compensation as Parliament may determine.

148.

<sup>1</sup> See Act No. 27 of 1923; Act No. 20 of 1912 as amended by Act No. 30 of 1914.



**Administration of Native Affairs, &c.**

147.<sup>1</sup> The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General-in-Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive Council of any Colony for the purpose of reserves for native locations shall vest in the Governor-General-in-Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor or Governor and Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Act of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament. 22, 24, 446, 460.

**Devolution on Union of Rights and Obligations under Conventions.**

148. (1) All rights and obligations under any conventions or agreements which are binding on any of the Colonies shall devolve upon the Union at its establishment.

(2) The provisions of the railway agreement between the Governments of the Transvaal, the Cape of Good Hope, and Natal, dated the second of February, nineteen hundred and nine, shall, as far as practicable, be given effect to by the Government of the Union.

42, 65, 78.

**PART IX****NEW PROVINCES AND TERRITORIES****Alteration of Boundaries of Provinces.**

149.<sup>2</sup> Parliament may alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, on the petition of the provincial council of every province whose boundaries are affected thereby.

75, 79.

**Power to Admit into Union Territories Administered by British South Africa Company.**

150.<sup>3</sup> The King, with the advice of the Privy Council, may on addresses from the Houses of Parliament of the Union admit into

<sup>1</sup> See Act No. 38 of 1927.

<sup>2</sup> See South Africa Act Amendment Act, 1934, (Appendix IX).

<sup>3</sup> See section 10 of the Status of the Union Act, 1934 (Appendix VII).

the Union the territories administered by the British South Africa Company on such terms and conditions as to representation and otherwise in each case as are expressed in the addresses and approved by the King, and the provisions of any Order-in-Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland. 244.

#### Power to Transfer to Union Government of Native Territories.

151.<sup>1</sup> The King, with the advice of the Privy Council, may, on addresses from the Houses of Parliament of the Union, transfer to the Union the government of any territories, other than the territories administered by the British South Africa Company, belonging to or under the protection of His Majesty, and inhabited wholly or in part by natives, and upon such transfer the Governor-General-in-Council may undertake the government of such territory upon the terms and conditions embodied in the Schedule to this Act. 244.

### PART X

#### AMENDMENT OF ACT

##### Amendment of Act.

152. Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections *thirty-three* and *thirty-four* (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections *thirty-five* and *one hundred and thirty-seven*, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

13, 74, 84, 99, 100, 102, 103, 109, 110, 153, 183, 232, 233, 238-42

### PART XI<sup>2</sup>

#### SUPPLEMENTARY

##### Short Title.

153. *This Act may be cited as the South Africa Act, 1900.*

<sup>1</sup> See footnote <sup>2</sup>, p. 600. <sup>2</sup> Added by section 2 of Act No. 9 of 1925, See p. 111 *supra*.

## SCHEDULE

1. After the transfer of the government of any territory belonging to or under the protection of His Majesty, the Governor-General-in-Council shall be the legislative authority, and may by proclamation make laws for the peace, order, and good government of such territory: Provided that all such laws shall be laid before both Houses of Parliament within seven days after the issue of the proclamation or, if Parliament be not then sitting, within seven days after the beginning of the next session, and shall be effectual unless and until both Houses of Parliament shall by resolutions passed in the same session request the Governor-General-in-Council to repeal the same, in which case they shall be repealed by proclamation.

2. The Prime Minister shall be charged with the administration of any territory thus transferred, and he shall be advised in the general conduct of such administration by a commission consisting of not fewer than three members with a secretary, to be appointed by the Governor-General-in-Council, who shall take the instructions of the Prime Minister in conducting all correspondence relating to the territories, and shall also under the like control have custody of all official papers relating to the territories.

3. The members of the commission shall be appointed by the Governor-General-in-Council, and shall be entitled to hold office for a period of ten years, but such period may be extended to successive further terms of five years. They shall each be entitled to a fixed annual salary, which shall not be reduced during the continuance of their term of office, and they shall not be removed from office except upon addresses from both Houses of Parliament passed in the same session praying for such removal. They shall not be qualified to become, or to be, members of either House of Parliament. One of the members of the commission shall be appointed by the Governor-General-in-Council as vice-chairman thereof. In case of the absence, illness, or other incapacity of any member of the commission, the Governor-General-in-Council may appoint some other fit and proper person to act during such absence, illness, or other incapacity.

4. It shall be the duty of the members of the commission to advise the Prime Minister upon all matters relating to the general conduct of the administration of, or the legislation for, the said territories. The Prime Minister, or other Minister of State nominated by the Prime Minister to be his deputy for a fixed period, or, failing such nomination, the vice-chairman shall preside at all meetings of the commission, and in case of an equality of votes shall have a casting vote. Two members of the commission shall form a quorum. In case

the commission shall consist of four or more members, three of them shall form a quorum.

5. Any member of the commission who dissents from the decision of a majority shall be entitled to have the reasons for his dissent recorded in the minutes of the commission.

6. The members of the commission shall have access to all official papers concerning the territories, and they may deliberate on any matter relating thereto and tender their advice thereon to the Prime Minister.

7. Before coming to a decision on any matter relating either to the administration, other than routine, of the territories or to legislation therefor, the Prime Minister shall cause the papers relating to such matter to be deposited with the secretary to the commission, and shall convene a meeting of the commission for the purpose of obtaining its opinion on such matter.

8. Where it appears to the Prime Minister that the dispatch of any communication or the making of any order is urgently required, the communication may be sent or order made, although it has not been submitted to a meeting of the commission or deposited for the perusal of the members thereof. In any such case the Prime Minister shall record the reasons for sending the communication or making the order and give notice thereof to every member.

9. If the Prime Minister does not accept a recommendation of the commission or proposes to take some action contrary to their advice, he shall state his views to the commission, who shall be at liberty to place on record the reasons in support of their recommendation or advice. This record shall be laid by the Prime Minister before the Governor-General-in-Council, whose decision in the matter shall be final.

10. When the recommendations of the commission have not been accepted by the Governor-General-in-Council, or action not in accordance with their advice has been taken by the Governor-General-in-Council, the Prime Minister, if thereto requested by the commission, shall lay the record of their dissent from the decision or action taken and of the reasons therefor before both Houses of Parliament, unless in any case the Governor-General-in-Council shall transmit to the commission a minute recording his opinion that the publication of such record and reasons would be gravely detrimental to the public interest.

11. The Governor-General-in-Council shall appoint a resident commissioner for each territory, who shall, in addition to such other duties as shall be imposed on him, prepare the annual estimates of revenue and expenditure for such territory, and forward the same to

the secretary to the commission for the consideration of the commission and of the Prime Minister. A proclamation shall be issued by the Governor-General-in-Council, giving to the provisions for revenue and expenditure made in the estimate as finally approved by the Governor-General-in-Council the force of law.

12. There shall be paid into the Treasury of the Union all duties of customs levied on dutiable articles imported into and consumed in the territories, and there shall be paid out of the Treasury annually towards the cost of administration of each territory a sum in respect of such duties which shall bear to the total customs revenue of the Union in respect of each financial year the same proportion as the average amount of the customs revenue of such territory for the three completed financial years last preceding the taking effect of this Act bore to the average amount of the whole customs revenue for all the Colonies and territories included in the Union received during the same period.

13. If the revenue of any territory for any financial year shall be insufficient to meet the expenditure thereof, any amount required to make good the deficiency may, with the approval of the Governor-General-in-Council, and on such terms and conditions and in such manner as with the like approval may be directed or prescribed, be advanced from the funds of any other territory. In default of any such arrangement, the amount required to make good any such deficiency shall be advanced by the Government of the Union. In case there shall be a surplus for any territory, such surplus shall in the first instance be devoted to the repayment of any sums previously advanced by any other territory or by the Union Government to make good any deficiency in the revenue of such territory.

14. It shall not be lawful to alienate any land in Basutoland or any land forming part of the native reserves in the Bechuanaland Protectorate and Swaziland from the native tribes inhabiting those territories.

15. The sale of intoxicating liquor to natives shall be prohibited in the territories, and no provision giving facilities for introducing, obtaining, or possessing such liquor in any part of the territories less stringent than those existing at the time of transfer shall be allowed.

16. The custom, where it exists, of holding pitsos or other recognized forms of native assembly shall be maintained in the territories.

17. No differential duties or imposts on the produce of the territories shall be levied. The laws of the Union relating to customs and excise shall be made to apply to the territories.

18. There shall be free intercourse for the inhabitants of the

territories with the rest of South Africa subject to the laws, including the pass laws, of the Union.

19. Subject to the provisions of this Schedule, all revenues derived from any territory shall be expended for and on behalf of such territory: Provided that the Governor-General-in-Council may make special provision for the appropriation of a portion of such revenue as a contribution towards the cost of defence and other services performed by the Union for the benefit of the whole of South Africa, so, however, that that contribution shall not bear a higher proportion to the total cost of such services than that which the amount payable under paragraph 12 of this Schedule from the Treasury of the Union towards the cost of administration of the territory bears to the total customs revenue of the Union on the average of the three years immediately preceding the year for which the contribution is made.

20. The King may disallow any law made by the Governor-General-in-Council by proclamation for any territory within one year from the date of the proclamation, and such disallowance on being made known by the Governor-General by proclamation shall annul the law from the day when the disallowance is so made known.

21. The members of the commission shall be entitled to such pensions or superannuation allowances as the Governor-General-in-Council shall by proclamation provide, and the salaries and pensions of such members and all other expenses of the commission shall be borne by the territories in the proportion of their respective revenues.

22. The rights as existing at the date of transfer of officers of the public service employed in any territory shall remain in force.

23. Where any appeal may by law be made to the King-in-Council from any court of the territories, such appeal shall, subject to the provisions of this Act, be made to the Appellate Division of the Supreme Court of South Africa.

24. The Commission shall prepare an annual report on the territories, which shall, when approved by the Governor-General-in-Council, be laid before both Houses of Parliament.

25. All Bills to amend or alter the provisions of this Schedule shall be reserved for the signification of His Majesty's pleasure.

APPENDIX V  
LETTERS PATENT CREATING THE OFFICE OF  
GOVERNOR-GENERAL

UNION OF SOUTH AFRICA

LETTERS PATENT<sup>1</sup>

PASSED UNDER THE GREAT SEAL OF THE UNITED KINGDOM, CONSTITUTING THE OFFICE OF GOVERNOR-GENERAL AND COMMANDER-IN-CHIEF OF THE UNION OF SOUTH AFRICA.

*Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.*

*To all to whom these presents shall come.*

GREETING.

WHEREAS by an Act of Parliament passed on the Twentieth day of September, 1909, in the ninth year of Our reign, entitled 'An Act to constitute the Union of South Africa', it was enacted that it should be lawful for Us, with the advice of Our Privy Council, to declare by proclamation that, on and after a day therein appointed, not later than one year after the passing of that Act, Our Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony (hereinafter called the Colonies), should be united in a legislative union under one Government under the name of the Union of South Africa, and that on and after the day appointed by such proclamation the Government and Parliament of the Union should have full power and authority within the limits of the Colonies, but that We might at any time after the proclamation appoint a Governor-General for the Union:

And whereas We did on the Second day of December, 1909, by and with the advice of Our Privy Council, declare by Proclamation that on and after the Thirty-first day of May, 1910, the Colonies should be united into a legislative union under one Government under the name of the Union of South Africa:

And whereas by the said recited Act it was further enacted that the Governor-General shall be appointed by Us, and shall have and may exercise in the Union during Our pleasure, but subject to that Act, such of Our powers and functions as We may be pleased to assign to him, and that the provisions of that Act relating to the Governor-

<sup>1</sup> For commission appointing the governor-general, see *supra*, Chapter IV (i).



General shall extend and apply to the Governor-General for the time being, or such person as We may appoint to administer the Government of the Union:

And whereas We are desirous of making effectual and permanent provision for the office of Governor-General and Commander-in-Chief in and over the Union:

Now know ye that We do by these presents declare Our Will and pleasure as follows:

I. There shall be a Governor-General and Commander-in-Chief in and over Our Union of South Africa (herein after called the Union), and appointments to the said office shall be made by Commission under Our Sign Manual and Signet.

And We do hereby authorize and command Our said Governor-General and Commander-in-Chief (herein after called the Governor-General) to do and execute, in due manner, all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the South Africa Act, 1909, and of these present Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as are or shall hereafter be in force in the Union.

II.<sup>1</sup> There shall be a Great Seal of and for the Union, which the Governor-General shall keep and use for sealing all things whatsoever that shall pass the said Great Seal. Provided that, until a Great Seal shall be provided, the private seal of the Governor-General may be used as the Great Seal of the Union.

III. The Governor-General may on Our behalf exercise all powers under the South Africa Act, 1909, or otherwise in respect of the summoning, proroguing, or dissolving the Parliament of the Union.

IV. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence from the Union of the Governor-General, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under Our Sign Manual and Signet to be Our Lieutenant-Governor of the Union; or if there shall be no such Lieutenant-Governor in the Union, then in such person or persons as may be appointed by Us under Our

<sup>1</sup> For warrant authorizing the use of a great seal for the Union, see government notice No. 422 of 1911. See Royal Executive Functions and Seals Act, 1934 (Appendix VIII).



Sign Manual and Signet to administer the Government of the same; and in case there shall be no person or persons within the Union so appointed by Us, then in the Chief Justice of South Africa for the time being, or in case of the death, incapacity, removal, or absence from the Union of the said Chief Justice for the time being, then in the Senior Judge for the time being of the Supreme Court of South Africa then residing in the Union, and not being under incapacity. Provided always that the said Senior Judge shall act in the administration of the Government only if and when the said Chief Justice shall not be present within the Union and capable of administering the Government.

Provided further that no such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the Oaths appointed to be taken by the Governor-General of the Union, and in the manner provided by the Instructions accompanying these Our Letters Patent.

V. Whenever and so often as the Governor-General shall be temporarily absent from the Union in pursuance of any instructions from Us through one of Our Principal Secretaries of State, or in the execution of any Letters Patent or any Commission under Our Sign Manual and Signet appointing him to be Our High Commissioner or Special Commissioner for any territories in South Africa with which We may have relations, or appointing him to be Governor or to administer the Government of any Colony, province, or territory adjacent or near to the Union, or shall be absent from the Union for the purpose of visiting some neighbouring Colony, territory, or State, for a period not exceeding one month, then and in every such case the Governor-General may continue to exercise all and every the powers vested in him as fully as if he were residing within the Union.

VI. In the event of the Governor-General having occasion to be temporarily absent for a short period from the seat of Government or from the Union, he may, in every such case, by an instrument under the Public Seal of the Union, constitute and appoint any persons to be his Deputy within the Union during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor-General during such absence, but no longer, all such powers and authorities vested in the Governor-General, as shall in and by such instrument be specified and limited, but no others. Every such Deputy shall conform to and observe all such instructions as the Governor-General shall from time to time address to him for his guidance. Provided, nevertheless, that by the appointment of a Deputy, as aforesaid, the power and authority of the Governor-General shall not be abridged, altered, or in any way

affected, otherwise than We may at any time hereafter think proper to direct.

Provided further that, if any such Deputy shall have been duly appointed, it shall not be necessary during the continuance in office of such Deputy for any person to assume the Government of the Union as Administrator thereof.

VII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of the Union, to be obedient, aiding, and assisting unto the Governor-General, or, in the event of his death, incapacity, or absence, to such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of the Union.

VIII. And We do hereby reserve to Ourselves, Our heirs, and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

IX. These Our Letters Patent shall be proclaimed at such place or places within the Union as the Governor-General shall think fit, and shall commence and come into operation on the day fixed by Our Proclamation for the establishment of the Union.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster this Twenty-ninth day of December, in the Ninth Year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

APPENDIX VI  
ROYAL INSTRUCTIONS TO THE GOVERNOR-GENERAL  
UNION OF SOUTH AFRICA  
INSTRUCTIONS

PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET TO THE  
GOVERNOR-GENERAL AND COMMANDER-IN-CHIEF OF THE UNION OF  
SOUTH AFRICA.

EDWARD R. & I.

*Instructions to Our Governor-General and Commander-in-Chief in and  
over Our Union of South Africa, or in his absence, to Our Lieutenant-  
Governor or the Officer for the time being administering the government  
of the Union.*

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General and Commander-in-Chief (therein and hereinafter called the Governor-General) in and over Our Union of South Africa (therein and hereinafter called the Union);

And whereas We have thereby authorized and commanded the Governor-General to do and execute in due manner all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as shall hereafter be in force in the Union;

Now, therefore, We do, by these Our Instructions under Our Sign Manual and Signet, declare Our pleasure to be as follows:—

I. Our first appointed Governor-General shall, with all due solemnity, cause Our Commission under Our Sign Manual and Signet appointing him to be read and published in the presence of the Senior Military Officer for the time being in command of Our Regular Forces in South Africa, and of such persons as are able to attend.

II. The said first appointed Governor-General shall take the Oath of Allegiance and the Oath of Office in the forms provided by an Act

passed in the Session holden in the thirty-first and thirty-second years of the Reign of Her late Majesty Queen Victoria, intituled 'An Act to amend the Law relating to Promissory Oaths'; which Oaths the senior Chief Justice or Judge of the Supreme Courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony then present is hereby required to tender and administer unto him.

III. Every Governor-General of the Union after the said first appointed Governor-General shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing him to be Governor-General to be read and published in the presence of the Chief Justice of South Africa, or some other Judge of the Supreme Court of South Africa.

IV. Every Governor-General, and every other officer appointed to administer the government of the Union after the first appointed Governor-General, shall take the Oath of Allegiance and the Oath of Office in the forms provided by an Act passed in the Session holden in the thirty-first and thirty-second years of the Reign of Her late Majesty Queen Victoria, intituled 'An Act to amend the Law relating to Promissory Oaths'; which Oaths the Chief Justice of South Africa, or some other Judge of the Supreme Court of South Africa, shall and he is hereby required to tender and administer unto him or them.

V. And We do authorize and require the Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every person or persons, as he shall think fit, who shall hold any office or place of trust or profit in the Union, the said Oath of Allegiance, together with such other oath or oaths as may from time to time be prescribed by any laws or statutes in that behalf made and provided.

VI. And We do require the Governor-General to communicate forthwith to the Members of the Executive Council for the Union these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them.

VII. The Governor-General shall not assent in Our name to any bill which We have specially instructed him through one of Our Principal Secretaries of State to reserve; and he shall take special care that he does not assent to any bill which he may be required under the South Africa Act, 1909, to reserve,<sup>1</sup> and in particular he shall reserve any bill which disqualifies any person in the Province of the Cape of Good Hope, who, under the laws existing in the Colony

<sup>1</sup> Cf. sections 60 and 106 of the South Africa Act, 1909, and the Status of the Union Act, 1934 (Appendix VII).

of the Cape of Good Hope at the establishment of the Union, is, or may become, capable of being registered as a voter, from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only.<sup>1</sup>

VIII. The Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of the Union; which he is to require from the clerks or other proper officers in that behalf, of the said Parliament.

IX. And We do further authorize and empower the Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of the Union has been committed for which the offender may be tried within the Union, to grant a pardon to any accomplice<sup>2</sup> in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and, further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, within the Union, a pardon,<sup>3</sup> either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as to the Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us.<sup>4</sup> Provided always, that if the offender be a natural-born British subject or a British subject by naturalization in any part of Our Dominions, the Governor-General shall in no case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from the Union.

And we do hereby direct and enjoin that the Governor-General shall not pardon, grant remission to, or reprieve any such offender without first receiving in cases other than capital cases the advice of one, at least, of his Ministers. Whenever any offender shall have

<sup>1</sup> Cf. section 35 (1) of the South Africa Act, 1909.

<sup>2</sup> See section 282 of Act No. 31 of 1917.

<sup>3</sup> See section 376 et seq. of Act No. 31 of 1917.

<sup>4</sup> Cf. sections 47, 48, 49, and 51 of the Prisons and Reformatories Act, 1911 (Act No. 13 of 1911).

been condemned to suffer death by the sentence of any Court, the Governor-General shall consult the Executive Council upon the case of such offender, submitting to the Council any report that may have been made by the Judge who tried the case, and, whenever it appears advisable to do so, taking measures to invite the attendance of such Judge at the Council. The Governor-General shall not pardon or reprove any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon; but in all cases he is to decide either to extend or to withhold a pardon or reprove according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise; entering nevertheless, on the Minutes of the Executive Council, a Minute of his reasons at length in case he should decide any such question in opposition to the judgment of the majority of the Members thereof.

X. Except in accordance with the provisions of any Letters Patent or of any Commission under Our Sign Manual and Signet, the Governor-General shall not, upon any pretence whatever, quit the Union without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, unless for the purpose of visiting some neighbouring Colony, Territory, or State, for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the Union.

The temporary absence of the Governor-General for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he have duly appointed a Deputy in accordance with the above-recited Letters Patent, nor shall any extension of such period sanctioned by one of Our Principal Secretaries of State and not exceeding fourteen days, be deemed absence from the Union within the meaning of the said Letters Patent.

Given at Our Court at Saint James's, this Twenty-ninth day of December, 1909, in the Ninth Year of Our Reign.

APPENDIX VII c  
THE STATUS OF THE UNION ACT,  
NO. 69 OF 1934

To provide for the declaration of the Status of the Union of South Africa; for certain amendments of the South Africa Act, 1909, incidental thereto, and for the adoption of certain parts of the Statute of Westminster, 1931.

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord 1926 and 1930, did concur in making the declarations and resolutions set forth in the Reports of the said Conferences, and more particularly in defining the group of self-governing communities composed of Great Britain and the Dominions as 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations';

And whereas the said resolutions and declarations in so far as they required legislative sanction on the part of the United Kingdom have been ratified, confirmed and established by the Parliament of the United Kingdom in an Act entitled the Statute of Westminster, 1931 (22. Geo. V, c. 4);

And whereas it is expedient that the status of the Union of South Africa as a sovereign independent state as hereinbefore defined shall be adopted and declared by the Parliament of the Union and that the South Africa Act, 1909 (9. Edw. 7, c. 9) be amended accordingly;

And whereas it is expedient that the said Statute of Westminster, in so far as its provisions are applicable to the Union of South Africa, and an Afrikaans version thereof, shall be adopted as an Act of the Parliament of the Union of South Africa;



Now, therefore, be it declared and enacted by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:—

1. In this Act the expression 'the South Africa Act' means the South Africa Act, 1909 (9. Edw. 7, c. 9) as amended from time to time.

Definition.

2. The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.

Union Parliament to be sole sovereign legislature for Union.

3. The parts of the Statute of Westminster, 1931 (22. Geo. V, c. 4) and the Afrikaans version thereof, set forth in the Schedule to this Act, shall be deemed to be an Act of the Parliament of the Union and shall be construed accordingly.

Adoption of parts of Statute of Westminster.

4. (1) The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative.

King to act with advice of his South African Ministers.

(2) Save where otherwise expressly stated or necessarily implied, any reference in the South Africa Act and in this Act to the King shall be deemed to be a reference to the King acting on the advice of his Ministers of State for the Union.

(3) The provisions of sub-sections (1) and (2) shall not be taken to affect the provisions of sections *twelve, fourteen, twenty and forty-five* of the South Africa Act and the constitutional conventions relating to the exercise of his functions by the Governor-General under the said sections.

5. Section *two* of the South Africa Act is hereby amended by the insertion after the word 'implied' of the words—

Amendment of section 2 of South Africa Act.

"'heirs and successors" shall be taken to mean His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland as

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determined by the laws relating to the succession of the Crown of the United Kingdom of Great Britain and Ireland'.

Amendment of  
sections 20 and  
44 of South  
Africa Act.

6. Sections *twenty-six* and *forty-four* of the South Africa Act are hereby amended by the deletion of the words 'a British subject of European descent' in paragraphs (d) and (c) respectively of the said sections and the substitution therefor of the words 'a person of European descent who has acquired Union nationality whether—

- (i) by birth or
- (ii) by domicile as a British subject or
- (iii) by naturalization, or otherwise, in terms of Act 40 of 1927 or of Act 14 of 1932.'

Amendment of  
section 51 of  
South Africa  
Act.

7. Section *fifty-one* of the South Africa Act is hereby amended by the deletion of the words 'of the United Kingdom of Great Britain and Ireland' where they occur in the oath and in the affirmation prescribed by the said section, and by inserting the words 'King or Queen (as the case may be)' immediately after the words 'His Majesty'.

Repeal of sec-  
tion 64 of  
South Africa  
Act.

8. Section *sixty-four* of the South Africa Act is hereby repealed and the following section substituted therefor:—

'Royal As-  
sent to Bills.

64. When a Bill is presented to the Governor-General for the King's assent he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in that behalf by the King, that he assents in the King's name, or that he withholds assent. The Governor-General may return to the House in which it originated any Bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation.'

Amendment of  
section 37 of  
South Africa  
Act.

9. Section *sixty-seven* of the South Africa Act is hereby amended by the deletion of the words 'or having been reserved for the King's pleasure shall have received his assent'.

Certain pro-  
visions of South  
Africa Act not

10. Nothing in this Act contained shall affect the provisions of section *one hundred and six* of the South

Africa Act, relating to an appeal to the King-in-Council, or the provisions of sections *one hundred and fifty* and *one hundred and fifty-one* of the said Act, affected by this Act.

11. (1) Sections *eight* and *sixty-six* of the South Africa Act are hereby repealed. Repeal of sections of South Africa Act.

(2) Section *sixty-five* shall be repealed as from a date to be fixed by the Governor-General by proclamation in the *Gazette*.

12. This Act shall be known as the Status of the Union Act, 1934. Short title.

## SCHEDULE

### STATUTE OF WESTMINSTER, 1931

(Sections 1, 2, 3, 4, 5, 6, 11 and 12 of the Statute are enacted. See Appendix III.)

The Status of the Union Bill was sent to the King with a submission signed by the Prime Minister of the Union requesting the King's approval of the Bill. The submission, with the King's approval, was in the following form:

OFFICE OF THE PRIME MINISTER  
AND  
MINISTER OF EXTERNAL AFFAIRS.  
CAPETOWN

*Approved*

GEORGE R. I.

*June 22nd 1934.*

31st May, 1934.

General Hertzog, Prime Minister and Minister of External Affairs in the Union of South Africa, with his humble duty to the King, begs to submit to Your Majesty a Bill 'to Provide for the declaration of the Status of the Union of South Africa; for certain amendments of the South Africa Act, 1909, incidental thereto, and for the adoption of certain parts of the Statute of Westminster, 1931' which His Excellency the Governor-General has reserved for the signification of Your Majesty's pleasure.

Your Majesty's MINISTERS for the Union have given their earnest consideration to this Bill and beg to submit that Your Majesty may be graciously pleased to signify Your Majesty's assent thereto by making an endorsement to that effect either on this submission or upon the Bill itself.

All of which is submitted by Your Majesty's  
humble, and obedient servant,  
J. B. M. HERTZOG.

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APPENDIX VIII

THE ROYAL EXECUTIVE FUNCTIONS AND  
SEALS ACT, NO. 70 OF 1934

To provide for the King's Acts as Head of the Executive of the Union, the use of Royal Seals in connection therewith and the vesting of certain functions in Union officials and bodies.

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:—

Royal Great  
Seal and Signet.

1. (1) There shall be a Royal Great Seal of the Union hereinafter referred to as the Great Seal, which shall show on the obverse the effigy of the Sovereign, with his full titles as circumscription and on the reverse the coat of arms of the Union with supporters and the inscription 'Unie van Suid-Afrika' and 'Union of South Africa'.

(2) There shall be a Royal Signet (hereinafter referred to as the Signet) showing the reverse of the Great Seal with the Tudor Crown for crest and the King's full title in Latin on the outer rim and the words 'Unie van Suid-Afrika—Union of South Africa' on the inner rim.

(3) The Great Seal and Signet shall be of a design and size approved of by the King and the Great Seal shall show the effigy of the Sovereign in such manner and of such design as His Majesty may be pleased to approve.

On demise of  
Sovereign ex-  
isting Seals to  
be used tem-  
porarily.

2. In the case of a change in the person of the Sovereign the then existing seals shall be used until such time as new seals have been struck and put into use.

Prime Minister  
to be Keeper of  
the Royal  
Seals.

3. The Prime Minister of the Union or, in his absence, his deputy shall be the Keeper of the Great Seal and the Signet.

Executive acts  
of the King  
and their con-  
firmation.

4. (1) The King's will and pleasure as Head of the Executive Government of the Union shall be expressed in writing under his sign manual, and every such instrument shall be countersigned by one of the King's Ministers for the Union.

(2) The King's sign manual shall furthermore be confirmed by the Great Seal on all royal proclamations and he may, by proclamation, prescribe from time to

time which other public instruments bearing his sign manual shall pass either the Great Seal or the Signet.

(3) The Keeper of the Seals shall affix either the Great Seal or the Signet, as the case may be, to any instrument bearing the King's sign manual and the countersignature of one of His Majesty's Ministers of State for the Union and required to pass either the Great Seal or the Signet.

(4) The provisions of this section shall not affect the exercise of the powers under sections *twelve, fourteen, twenty and forty-five* of the South Africa Act, 1909, by the King or the Governor-General.

5. (1) The Governor-General-in-Council may by regulation provide for the making of wafer seals, representing the Great Seal, of such material as he may deem suitable and prescribe the size of the cast to be used for that purpose.

Making and use of wafer seals representing Great Seal.

(2) The wafer seals made in pursuance of the provisions of sub-section (1) shall be kept by the Keeper of the Great Seal and may be used by him for sealing instruments which are required to pass the Great Seal, and instruments to which such wafer seals have been affixed shall be deemed to be sufficiently sealed in terms of this Act.

6. (1) Whenever for any reason the King's signature to any instrument requiring the King's sign manual cannot be obtained or whenever the delay involved in obtaining the King's signature to any such instrument in the ordinary course would, in the opinion of the Governor-General-in-Council, either frustrate the object thereof, or unduly retard the despatch of public business, the Governor-General shall, subject to such instructions as may, from time to time, in that behalf, be given by the King on the advice of His Ministers of State for the Union, execute and sign such instrument on behalf of His Majesty and an instrument so executed and signed by the Governor-General and countersigned by one of the King's Ministers of the Union shall be of the same force and effect as an instrument signed by the King.

Governor-General to act for King in certain cases.

(2) The Governor-General's signature on such an instrument shall be confirmed by his Great Seal of the Union and a resolution of the Governor-General-in-Council shall be the necessary authority for affixing the same.

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Vesting of powers of the King-in-Council under Statutes of United Kingdom Parliament in Governor-General-in-Council.

7. In the absence of any Act of the Parliament of the Union providing otherwise, the powers of the King to be exercised by His Majesty in Council or by Order-in-Council, under Acts of the Parliament of the United Kingdom passed prior to the commencement of the Statute of Westminster, 1931, and extending to the Union as part of the law of the Union shall, in respect of the Union, after the commencement of this Act, be exercised respectively by the Governor-General-in-Council or by him by Proclamation in the *Gazette* unless the Governor-General-in-Council decide that the exigencies of the case require that the procedure prescribed by such Acts be followed: Provided that the King-in-Council shall in the latter case act or purport to act in respect of the Union only at the request of the Prime Minister of the Union duly conveyed and it be expressly declared in the instrument containing the King's pleasure that the Union has requested and consented to the King-in-Council so acting in respect of the Union.

Vesting of functions of British functionaries under Statutes of United Kingdom Parliament in Union functionaries.

8. The powers vested in, or duties imposed on, the Lord Chancellor, a Secretary of State, a Commissioner of the Treasury, the Treasury, the Admiralty, the Board of Trade, or any other functionary or authority of the United Kingdom under any Act of the Parliament of the United Kingdom referred to in section *seven*, or under any rule, order or regulation framed thereunder shall after the commencement of this Act, in respect of the Union, be vested in or performed by such Minister, Department of State, functionary or authority in the Union as the Governor-General-in-Council may by proclamation in the *Gazette* designate.

Sections 7 and 8 not applicable to section 100 of South Africa Act.

9. Sections *seven* and *eight* shall not apply to appeals to the King-in-Council under the provisions of section *one hundred and six* of the South Africa Act, 1909.

Short title and commencement of Act.

10. This Act shall be known as the Royal Executive Functions and Seals Act, 1934, and shall come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*.<sup>1</sup>

<sup>1</sup> The Act came into force on December 3, 1934, by Proclamation No. 232 of 1934, dated November 30, 1934.

## APPENDIX IX

### SOUTH AFRICA ACT AMENDMENT ACT, NO. 45 OF 1934

#### ACT

To amend and extend the provisions of section *one hundred and forty-nine* of the South Africa Act, 1909.

BE IT ENACTED by the King's Most Excellent Majesty the Senate and the House of Assembly of the Union of South Africa, as follows:

#### *Amendment of Section 149 of South Africa Act.*

1. Section *one hundred and forty-nine* of the South Africa Act is hereby deleted and the following new section substituted therefor:

149. Parliament shall not—

'Petition by provincial council necessary for alteration of provinces or for abolition of provincial councils.'

- (a) alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, except on the petition of the provincial council of every province whose boundaries are affected thereby;
- (b) abolish any provincial council or abridge the powers conferred on provincial councils under section *eighty-five*, except by petition to Parliament by the provincial council concerned.'

#### *Short title.*

2. This Act shall be known as the South Africa Act Amendment Act, 1934.

When introducing the above measure, the Minister in charge of the bill, Mr. O. Pirow, K.C., stated: 'The juridical value of this bill is not great. Parliament can enact it with a majority of one and can recall it with a majority of one. But it is a declaration of policy and is of great moral value to the people who attach any importance to the retention of the provincial system.' (House of Assembly, May 24, 1934.)

*Note:* The Government announced its intention of introducing the Union Constitution Bill early in 1935. This bill aims at re-enacting the South Africa Act, as amended, as a schedule to the proposed act, in English and Afrikaans. This enactment will not affect the legal position as stated in this book.

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